No. 87-1490-CFX
Status: GRANTED

Title: John E. Mallard, Petitioner
v.
United States District Court for the Southern District of Iowa, et al.

Docketed:
March 5, 1988

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Mallard,John E.

Counsel for respondent: Allen,Gordon E.

Entry	Date	Note	Proceedings and Orders
1	Mar 5 1988	G	Petition for writ of certiorari filed.
2	Apr 13 1988		DISTRIBUTED. April 29, 1988
3	Apr 28 1988	P	Response requested -- BRW, TM. (Due May 28, 1988)
4	Jul 16 1988		Brief of respondent District Court in opposition filed.
5	Jul 20 1988		REDISTRIBUTED. September 26, 1988
6	Jul 21 1988	X	Reply brief of petitioner John E. Mallard filed.
7	Oct 3 1988		Petition GRANTED.
			**********
8	Nov 17 1988		Joint appendix filed.
9	Nov 17 1988		Brief of petitioner John E. Mallard filed.
10	Nov 17 1988		Brief amicus curiae of State Bar of California filed.
11	Nov 17 1988		Brief amicus curiae of California Attorneys for Criminal Justice, et al. filed.
12	Nov 18 1988		Record filed.
		*	Certified copy of original record received from USDC S.D., Iowa, received.
14	Dec 5 1988		Order extending time to file brief of respondent on the merits until December 30, 1988.
15	Dec 30 1988		Brief of respondent District Court filed.
16	Dec 30 1988		Brief amicus curiae of Bar of the City of New York filed.
17	Dec 30 1988		Brief amicus curiae of Legal Services Corp. of Iowa filed.
18	Jan 4 1989		CIRCULATED.
19	Jan 4 1989		CIRCULATED.
20	Jan 6 1989		SET FOR ARGUMENT TUESDAY, FEBRUARY 28, 1989. (3RD CASE.)
21	Jan 27 1989	Y	Reply brief of petitioner John E. Mallard filed.
22	Feb 28 1989		ARGUED.

87-1490

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

Counsel for Petitioner

March 4, 1988

38

QUESTION PRESENTED

Is a federal court empowered by 28 U.S.C. Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel thereunder?

LIST OF PARTIES

The parties to the proceedings below were the petitioner John E. Mallard and the respondents United States District Court for the Southern District of Iowa, Mark Allen Traman, Michael D. Woods, Jr., Charles O. Reese, Steve Parkin, Robert W. Umthun, Robert Staub, Myron Mason, Mike Booten, Charles Harper, Ronald G. Welder, and Harry Grabowski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioner John E. Mallard respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled proceeding on December 7, 1987.

OPINIONS BELOW

The Court of Appeals for the Eighth Circuit did not write an opinion, and its order is retyped in the appendix hereto,

p. 1a, infra.

The ruling of the United States District Court for the Southern District of Iowa (Vietor, C.J.) has not been reported. It is reprinted in the appendix hereto, p. 2a, infra.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Section 1983, plaintiffs brought suit in the case of Mark Allen Traman et al. v Steve Parkin et al., Civil No. 87-317-B, in the United States District Court for the Southern District of Iowa. Plaintiffs asked to have a lawyer appointed and, pursuant to 28 U.S.C. Section 1915(d), the petitioner was appointed to represent plaintiffs. On October 27, 1987, the District Court denied the petitioner's motion to dismiss his appointment. On December 7, 1987, the Eighth Circuit denied the

petitioner's application for a writ of mandamus directing the District Court to grant the petitioner's motion to dismiss his appointment.

The jurisdiction of this Court to review the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

28 U.S.C. Section 1915. Proceedings in forma pauperis

(d) The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

Petitioner was appointed pursuant to 28 U.S.C. Section 1915 to represent two indigent inmates of the Iowa State Penitentiary at Fort Madison, Iowa, and

one indigent former inmate, who had, collectively, brought an action under 42 U.S.C. Section 1983. The inmates complained that various prison guards and officials had filed false disciplinary reports against them, mistreated them physically, and endangered their lives by exposing their role as informants.

Petitioner filed a motion seeking the dismissal of his appointment on the grounds (a) that he was not competent to represent the inmates based on his general lack of experience in litigation and (b) that 28 U.S.C. Section 1915(d) does not empower the District Court to require an unwilling attorney to represent a person making a request for counsel thereunder. The District Court denied the petitioner's motion to dismiss, holding (p. 2a, infra) that "28 U.S.C. Section 1915(d) empowers the court

to appoint attorneys to represent indigent civil litigants."

It is significant to note that in the context in which the District Court ruled, the usage of the term "to appoint" was synonymous with the term "to require" rather than the term "to request," which appears in the text of Section 1915(d). There are many cases which hold that Section 1915(d) empowers the court "to appoint." However, most of these cases construe the term "to appoint" to be consistent with the term "to request," meaning that a court has power "to appoint" under Section 1915(d) after an attorney has been requested to undertake a representation and has consented to act as counsel.

In light of the substantial authority which construes Section 1915(d) to mean that a court may only "request"

an attorney to represent an indigent person (pp. 9-10, infra), the petitioner sought appellate review of the District Court's ruling through an application for a writ of mandamus directing the District Court to grant the petitioner's motion to dismiss his appointment. The Eighth Circuit denied the petitioner's application for a writ of mandamus, thereby effectively holding that the federal court can compel an unwilling attorney to represent a person making a request for counsel under Section 1915(d).

The Eighth Circuit did not write an opinion in support of its judgment (p. 1a, infra) but it appears that the Court relied upon its holding in Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971), which stated:

> The district court ruled that it had no power to appoint counsel to represent an indigent in civil cases. This ruling overlooks the

> express authority given it in 28 U.S.C. Section 1915 to appoint counsel in civil cases. This court and other courts of appeals regularly make these appointments in habeas corpus and civil rights cases; district courts throughout the country do the same.

Id. at 757 (footnote omitted; emphasis in original). See Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984) (appointing counsel for Title VII case under 28 U.S.C. Section 1915(d)). See also Tyler v. Lark, 472 F.2d 1077, 1078-80 (8th Cir.), cert. denied sub nom. Beilenson v. Treasurer of U.S., 414 U.S. 864 (1973) (counsel appointed to prosecute 42 U.S.C. Section 1983 action may be compelled to serve without compensation).

It appears that the Eighth Circuit supports its holding that the power "to request" as stated in Section 1915(d) confers a power "to make a mandatory appointment" based upon a finding of some

traditional, professional duty of attorneys to volunteer their services:

> Lawyers have long served in state and federal practice as appointed counsel for indigents in both criminal and civil cases. The vast majority of the bar have viewed such appointments to be integrally within their professional duty to provide public service. Only rarely are lawyers asked to serve in civil matters. We have the utmost confidence that lawyers will always be found who will fully cooperate in rendering the indigent equal justice at the bar.

Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971).

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's determination that 28 U.S.C. Section 1915(d) empowers a federal court to require an unwilling attorney to serve as counsel (a) extends the federal court's authority beyond the statutory limit to "request" an attorney, and (b) conflicts with decisions of other Circuits.

28 U.S.C. Section 1915(d) provides, in relevant part, that "[t]he court may request an attorney to represent any such

person unable to employ counsel." (Emphasis added).

Among the Courts of Appeals which have construed Section 1915(d) in the context of determining the court's authority to require an unwilling attorney to represent an indigent person, the Eighth Circuit stands alone in finding a power to require an unwilling attorney to serve as counsel. The Fifth, Sixth, Seventh, and Ninth Circuits have uniformly held that the federal courts have no power to make a mandatory appointment under Section 1915(d), but can only "request" an attorney to undertake the representation. United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986) ("In our view, 28 U.S.C. Section 1915(d) does not authorize appointment of counsel to involuntary service"); Ulmer v. Chancellor, 691 F.2d

209, 213 (5th Cir. 1982) ("A lawyer should not be conscripted into a Section 1983 case simply because he is a member of the bar, but this does not mean that all members of the bar should be denied the opportunity to assist the cause of justice under the authority of a court appointment"); Caruth v. Pinkney 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to represent an indigent, not to require him to do so") (emphasis in original); Reid v. Charney, 235 F.2d 47 (6th Cir. 1956) ("The court . . . has the statutory power only to request an attorney to represent a person unable to employ counsel . . . . While the refusal of local counsel to serve was regrettable, the court could hardly do more than was done under the circumstances").

The Ninth Circuit, in the well reasoned opinion of United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986), describes several factors which support its holding that unwilling attorneys cannot be compelled to represent indigent persons under Section 1915(d):

> Most persuasively, the plain language of the statute states that a court may "request" counsel for indigents. See 28 U.S.C. Section 1915(d). Statutes that have been construed as authorizing "appointment" of counsel commonly use such words as "appointment" or "assign." See, e.g., 18 U.S.C. Section 3006A(b) (1982) ("the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel"); 25 U.S.C. Section 1912(b) (1982) ("In any case in which the court determines indigency, the parent or Indian custodian shall have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child.");

42 U.S.C. Section 1971(f) (1982) ("the court before which [a person charged with contempt under 42 U.S.C. Section 1975d(g)] is cited or tried . . . shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire . . . ."); 42 U.S.C. Section 2000e-5(f)(1)(1982) ("Upon application by the complainant [in a Title VII action] and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant . . . ."); see also Fed. R. Crim. P. 44 ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings . . . .").

In addition, if a statute intends appointment of counsel, it often makes provision for paying such counsel. See, e.g., 18 U.S.C. Section 3006A(d); 25 U.S.C. Section 1912(b) (1982). No statute provides funds to pay counsel secured under 28 U.S.C. Section 1915(d).

We also note that the consitutional requirements for civil actions differ significantly from those for criminal actions in which courts may appoint counsel. Federal criminal defendants facing imprisonment are entitled to representation of counsel, see, e.g., U.S. Const. amend. VI; Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938), and the power of courts

to appoint counsel for such defendants is thus necessary to preserve their constitutional rights. There is normally, however, no constitutional right to counsel in a civil case, see Lassiter v. Department of Social Services, 452 U.S. 18, 25-27, 101 S.Ct. 2153, 2158-60, 68 L.Ed.2d 640 (1981); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971). But cf. Lassiter, 452 U.S. at 27-32, 101 S.Ct. at 2159-62 (suggesting that due process may in some cases require appointment of counsel for indigent parents in child custody termination proceedings). The failure of a court request actually to secure counsel therefore would not normally prejudice the civil litigant's constitutional rights. United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986).

Many courts which have interpreted the meaning of Section 1915(d) have done so either (1) in the context of determining whether the court has the power to secure counsel for indigent persons or (2) in discussing the standards which a court should consider in deciding whether to exercise its

power. Consequently these courts have used the word "appoint" without any need to differentiate as to whether it means (i) to order an attorney to represent an indigent client or (ii) to designate a pro bono volunteer attorney as counsel of record for an indigent client. This point of semantics is illustrated by the following cases:

1. In McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982), the Seventh Circuit was confronted with a case where the district court had not attempted to obtain pro bono counsel. "The power of a court to provide counsel under Section 1915(d) is commonly referred to as a power to 'appoint.' The distinction between 'requesting' and 'appointing' is irrelevant in the present case where the district court was operating under the mistaken impression that it had no

authority whatsoever to secure counsel."

2. In Whisenant v. Yuam, 739 F.2d 160 (4th Cir. 1984), the Fourth Circuit was confronted with a case in which the district court had denied the request for counsel under 28 U.S.C. Section 1915(d) on the ground that federal funds were not available to pay counsel. The Fourth Circuit held that the availability of federal funds was unrelated to the need for counsel, that the case presented exceptional circumstances requiring the assistance of counsel, and that the district court had the power to appoint counsel. The Whisenant court cited McKeever and noted that the statutory right to "request" had been construed as authorization to "appoint." Whisenant 739 F.2d at 163 n.3. However, the Court never considered whether the authorization to "appoint" meant authorization (i)

to order an attorney to represent an indigent client or (ii) to designate a pro bono volunteer attorney as counsel of record for an indigent client.

3. In Hodge v. Police Officers, 802 F.2d 58 (2nd Cir. 1986), the Second Circuit considered the guidelines for the exercise of Section 1915(d) discretion. Consequently, the use of the word "appointment" in this opinion does not indicate that the Court intended that word to mean that unwilling attorneys would be compelled to represent indigent persons.

Therefore, an analysis of the case law interpreting Section 1915(d), with due consideration to the context in which courts have used the term "appoint," shows that courts other than the Eighth Circuit have not interpreted Section 1915(d) to authorize appointment of

counsel to involuntary service.

The Eighth Circuit has thus created a confusing precedent by interpreting the term "to appoint" in such a way as to empower it to require unwilling attorneys to represent indigent persons. This precedent, which is based upon Peterson v. Nadler, 452 F.2d 754 (8th Cir. 1971), is likely to generate further confusion among the other Courts of Appeals which have not considered this issue, especially in light of the widespread use of the term "to appoint." There exists a very real potential that a court will miss the chain of logic which follows from (i) the request that an attorney undertake a representation, to (ii) the the voluntary acceptance by the attorney, to (iii) the appointment under the authority of the court. It appears that the Eighth Circuit itself may have

suffered from this confusion when it rendered its decision in Peterson v. Nadler, 754 F.2d 452 (8th Cir. 1971), without discussing or disapproving of Rhodes v. Houston, 258 F. Supp. 546 (D. Neb. 1966), aff'd, 418 F.2d 1309 (8th Cir. 1969), cert. denied, 397 U.S. 1049 (1970). The Rhodes court referred to

> the power of the attorney, by the court requested to provide professional assistance to a plaintiff in a civil suit, simply through his refusal of that request, for whatever reason, or for no reason, to frustrate the court's attempt to provide such plaintiff with counsel.

Rhodes v. Houston, 258 F. Supp. at 579 (emphasis in original).

Without guidance from this Court, the law regarding 28 U.S.C. Section 1915(d) will remain an open issue. The decisions (p.9, supra) of the Fifth, Seventh, and Ninth Circuits are relatively recent, having been decided in 1982,

1982, and 1986, respectively. In addition, because the cases apparently relied upon by the Eighth Circuit (p.6, supra) do not involve an attorney who is unwilling to accept an appointment, attorneys in the Eighth Circuit will remain confused regarding their obligations under Section 1915(d). The likelihood of confusion among attorneys in the Eighth Circuit is especially significant in light of the recent decision in United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986), in which the Ninth Circuit clearly holds that Section 1915(d) does not authorize appointment of counsel to involuntary service. Id. at 801.

Finally, it is significant that the ruling of the District Court for the Southern District of Iowa below (p. 2a, infra) relied upon another case in that

District Court which was decided on June 16, 1987. Consequently, a decision by this Court would prevent multiple, frequent, and inconsistent determinations by lower courts.

II

The decision below raises important and unresolved issues regarding the limits of the right to counsel and the limits of the responsibility of the federal bar to assist in making counsel available.

The Eighth Circuit has held in this case that attorneys may be compelled to accept an "appointment" to represent an indigent person pursuant to 28 U.S.C. Section 1915(d). In doing so, the Court apparently relied on a case that, contrary to the clear statutory language (that a court may "request" an attorney to represent an indigent) reads into the statute the power to compel an attorney to provide representation based upon the professional duty of the bar to provide

public service. See Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971).

It is clear that attorneys have committed themselves to make legal counsel available and to aspire to assist persons who do not have the financial ability to employ counsel. The Iowa Code of Professional Responsibility For Lawyers states:

> Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees
>
> EC 2-26. A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.
>
> EC 2-27. Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic

> responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional experience or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, and others will be developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

That lawyers should perform pro bono services is not in dispute. The issue here is whether lawyers will continue to enjoy their traditional freedom to choose the circumstances under which they perform such services.

There are, obviously, limits to the

attorney's professional duty to provide services to indigents. One such limit is the power of the attorney to refuse a request under 28 U.S.C. 1915(d).

The Court of Appeals for the Eighth Circuit has, to all appearances, failed to acknowledge and consider the limits of an attorney's professional duty to perform volunteer services. However, the Ninth Circuit recently considered this issue in United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986). The Court concluded that 28 U.S.C. Section 1915(d) does not authorize the appointment of counsel to involuntary service, reasoning that Congress chose to limit an attorney's professional duty when it used the plain language that a court may "request" counsel for indigents. Id. The Ninth Circuit's finding of a limitation on an attorney's

obligation is especially persuasive because the Court describes certain contrasting instances where statutes and well-settled constitutional law provide that an attorney "will" be appointed (pp. 11-13, supra). Based upon the authorities cited, it is clear that the drafters of the Constitution and Congress have singled out certain rights and privileges which are so highly regarded that legal representation must be made available, and a mandatory appointment of counsel is justified. With this understanding in mind, it is clear, and the Ninth Circuit so found, that Congress never decided to provide indigents or holders of Section 1983 claims with this extraordinary assurance of access to legal representation.

The Ninth Circuit also implicitly recognized that an attorney's obligation

to provide public service must be circumscribed so that the time required to be volunteered by the attorney, based upon the complexities of the modern legal system, does not lead to a financial penalty or tax "in kind." Because Congress has often made provision for the payment of appointed counsel, the Court implies that, in general, Congress does not intend to impose a mandatory appointment obligation upon an attorney in those instances involving statutes, such as 28 U.S.C. Section 1915(d), which do not provide for compensation. Id.

There are additional, important reasons why Congress would not want to compel an attorney to become involved in a particular case just because it involves an indigent person. For example, an attorney may have expertise in one area of law but not in another.

There would be little efficiency if a bankruptcy expert were assigned to try a case under 42 U.S.C. Section 1983, or vice versa.

At a minimum, the volunteer attorney should be competent. Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 6-101(A)(1) provides that: "A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." Consequently, a lawyer volunteering his services should not be compelled to undertake a particular legal representation if he does not feel competent to handle it, regardless of whether the prospective client has the ability to pay.

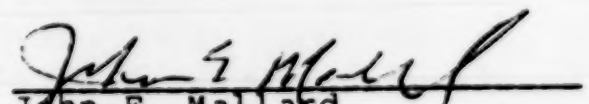
As a final consideration, in the interest of promoting volunteerism as a

public policy, an attorney should not be compelled to undertake the cause of a particular indigent if he has greater interest in other causes. An attorney's preferences of association with certain causes should be respected. Otherwise, compelling an attorney to "volunteer" his services for a particular cause would transform pro bono work from an activity based upon the "giving" of services to an activity with certain indicia of involuntary servitude.

CONCLUSION

For these various reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,



John E. Mallard
107 South Main
Fairfield, Iowa 52556
Counsel for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2583

In Re: John E. Mallard,	*	Petition for
	*	Writ of
Petitioner,	*	Mandamus
	*	
	*	

The petition for writ of mandamus is hereby denied.

December 7, 1987

A true copy.

ATTEST: /s/ Robert St. Vrain
CLERK, U.S. COURT OF
APPEALS, EIGHTH CIRCUIT

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN,	*	
	*	
Plaintiffs,	*	CIVIL NO. 87-317-B
	*	
v.	*	
	*	
STEVE PARKIN, et al.,	*	RULING ON MOTION
	*	
	*	
Defendants.	*	

The court has before it attorney John E. Mallard's appeal of the Magistrate's denial of his motion to withdraw, and his motion to dismiss appointment of counsel. The appeal and motion are unresisted, although time to do so has past.

Attorney Mallard argues first that he is incompetent, and therefore he should be permitted to withdraw, and second, that the court lacks power to appoint him to represent an indigent civil litigant. Mallard can hardly claim

incompetence when he has filed an eighteen page brief in support of this motion that demonstrates thorough research, careful reasoning, and effective writing. Despite his renunciation of any claim to being a "litigator", Mallard does have litigation experience. Even without litigation experience, Mallard would not necessarily be incompetent. Therefore, Mallard is not incompetent. On the second point, this court rejected that challenge in Coburn v. Nix, Civ. No. 86-716-B (S.D. Iowa June 16, 1987). In Coburn, this court held that 28 U.S.C. Section 1915(d) empowers the court to appoint attorneys to represent indigent civil litigants. Id.

Attorney Mallard's appeal is denied and the motion to dismiss appointment of counsel is overruled.

DATED this 27 day of October, 1987.

/s/ Harold D. Vietor

HAROLD D. VIETOR, Chief
Judge Southern District of Iowa

(2)

No. 87-1698

In The

Supreme Court of the United States

October Term, 1987

JOHN E. MALLARD,

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General
Second Floor
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164
Counsel of Record

Counsel for Respondent District Court

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

COUNTER-STATEMENT OF QUESTION PRESENTED FOR REVIEW

Is 28 U.S.C. Section 1915(d) so unambiguous that rational and substantial legal argument on its construction cannot be made, so that a pretrial petition for mandamus to the district court must be granted?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

In The

Supreme Court of the United States

October Term, 1987

JOHN E. MALLARD,

Petitioner,

vs.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, et al.,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Respondent United States District Court for the Southern District of Iowa respectfully suggests that the premature petition for certiorari be denied.

OPINION BELOW

The Court of Appeals for the Eighth Circuit did not write an opinion, and its order is contained in the appendix to the petition, page la. The ruling of the United States District Court for the Southern District of Iowa (Vietor, C.J.,) has not been reported. It is reprinted in the appendix to the petition, page 2a. Judge Vietor relied

upon the reasoning contained within a prior ruling, *Coburn v. Nix*, Civil No. 86-716-B (S.D. Iowa, June 16, 1987). That decision has not been reported. It is reprinted in the appendix to this Brief in Opposition, page 1a, *infra*.

STATEMENT OF THE CASE

Two inmates at the Iowa State Penitentiary at Fort Madison, Iowa, and one former inmate collectively brought an action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Iowa. The inmates complained that various prison guards and officials had filed false disciplinary reports against them, mistreated them physically and endangered their lives by exposing their role as informants. *Traman, et al., v. Steve Parkin, et al.*, Civil No. 87-317-B.[1] Concurrently with a finding of their indigency, on June 3, 1987, the District

[1]Defendants in the underlying action as Iowa state employees were entitled to and did receive legal representation through the office of the Attorney General. The undersigned counsel appeared on behalf of those defendants. Throughout the course of these proceedings on the § 1915(d) question, these defendants have perceived no legal interest and have not participated. At the request of Judge Vietor, the undersigned counsel is opposing the petition for certiorari on behalf of the District Court. Although the defendants still have no legal interest in the current procedural posture of the case, and even though at first glance counsel's position might be perceived to be a conflict of interest, nevertheless, in a very practical sense, defendants have an interest in effective and efficient advocacy leading to more just results.

Court appointed Petitioner to represent plaintiffs pursuant to 28 U.S.C. § 1915(d). On June 25, 1987, Petitioner filed with the magistrate for the Southern District a motion to withdraw as counsel pursuant to Local Court Rule 1.5.7 asserting "good cause" and addressed to the discretion of the magistrate. Petitioner cited his "incompetency" due to lack of experience in trials in general and civil rights trials specifically. On July 7, 1987, the magistrate denied his motion.

Pursuant to Local Court Rule 4.3.1, Petitioner appealed to the District Court asserting abuse of discretion and also moved to "dismiss" the order of appointment as beyond the power of the District Court. On October 27, 1987, the District Court denied the Petitioner's motion to dismiss his appointment, and subsequently on November 5, 1987, denied his request to add the statement required by 28 U.S.C. § 1292(b) for immediate appeal. The denial of that request was based upon Judge Vietor's view that " . . . I do not believe that an immediate appeal from my ruling would materially advance the ultimate termination of this litigation, which is Mr. Traman's litigation against the defendants". Appendix to this Brief, p. 8a.

Thereafter, on November 27, 1987, Petitioner filed a petition for writ of mandamus with the Eighth Circuit Court of Appeals requesting that the District Court be directed to dismiss his order of appointment as counsel for plaintiffs Traman, et al. That petition was denied on December 7, 1987. Petition for certiorari to the Eighth Circuit was filed with this Court on March 7, 1988, invoking the jurisdiction of this Court pursuant to 28 U.S.C.

§ 1254(1). No action to date has been taken on the underlying complaint.

SUMMARY OF ARGUMENT

The petition for mandamus was filed in lieu of an interlocutory appeal in a case still pending in the District Court. Its denial by the Eighth Circuit was required under the procedural posture of the case because rational and substantial legal arguments existed in support of the action of the District Court. Mandamus in lieu of subsequent appeal is severely limited. Review of that interlocutory ruling by certiorari in this Court is not only premature but inappropriate.

ARGUMENT

REASONS FOR DENYING THE WRIT

The Petition For Writ of Mandamus Was Premature, And Properly Denied.

The procedural posture of the underlying case and the method by which Petitioner seeks to present his question for review is paramount. The underlying action filed by plaintiffs Traman, et al. on May 28, 1987, remains pending for want of any activity. The order denying his request to withdraw was not immediately appealable to the Eighth Circuit. His request for a 28 U.S.C. § 1292 statement was denied. His chosen course of conduct was then a petition for writ of mandamus. That petition was reviewed within well-established guidelines.

> [T]he remedy of mandamus is a drastic one, to be invoked only in extraordinary situations.

Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 34, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980). Limited to "exceptional circumstances" the writ may issue when there is "a judicial usurpation of power". *Id.* at 35, 101 S.Ct. at 190; *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 273, 19 L.Ed.2d 305 (1967).

> Use of the writ of mandamus is severely limited to prevent litigants from obtaining appellate review of district court orders which otherwise could not be appealed until final judgment.

In re Lane, 801 F.2d 1040, 1042 (8th Cir. 1986), citing *Allied Chemical Corp.*, 449 U.S. at 35, 101 S.Ct. at 190.

The Eighth Circuit was justified in issuing the writ of mandamus only if Petitioner had established a "clear and indisputable right" to the relief sought based upon a non-discretionary duty of the District Court to honor that right and, importantly, that no other adequate alternative judicial remedies including appeal existed. *In re Lane*, 801 F.2d 1040, 1042 (8th Cir. 1986).

Petitioner has framed the issue by suggesting that the District Court is without power to enter its order of appointment. When the basis for the petition for writ of mandamus is a jurisdictional issue, the challenged assumption or denial of jurisdiction must be plainly wrong. 28 U.S.C. § 1915(d) must be unambiguous and provide a settled guide for the exercise of the District Court's jurisdiction. If a rational and substantial legal argument can be made in support of the action of the District Court, then the petition for mandamus must be denied, irrespective of whether an appeal after judgment

on the identical issue might later prove successful. *Stein v. Collinson*, 499 F.2d 91 (8th Cir. 1974). The Eighth Circuit, in reviewing the petition for mandamus within these principles, rightfully denied the petition.

Rational and Substantial Legal Arguments Support The Position Of The District Court.

That much is conceded by the Petition here. Petitioner acknowledges that "there are many cases which hold that § 1915(d) empowers the court 'to appoint'." Petition In Certiorari, p. 5. Petitioner juxtaposes then the "substantial authority" which construes § 1915(d) to mean that a court may only request. Most importantly to his petition in certiorari here, Petitioner then characterizes the Eighth Circuit's denial of mandamus as only "*effectively* holding that the federal court can compel an unwilling attorney to represent a person making a request for counsel under § 1915(d)." Petition In Certiorari, p. 6, emphasis added.

More correctly, the Eighth Circuit's one-line denial of the writ of mandamus was a reflection of the procedural posture of the case then presented to it. The Eighth Circuit was not presented with an unambiguous statute calling for the nondiscretionary exercise of judicial power. Rather, the petition for certiorari makes the case to the contrary. Allegations of judicial usurpation can be met with rational and substantial legal arguments. The Eighth Circuit is not alone in its construction of 28 U.S.C.

§ 1915(d).[2] *Hodge v. Police Officers*, 802 F.2d 58, 60-62 (2d Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982); *Whisenant v. Yuam*, 739 F.2d 160, 163, n. 3 (4th Cir. 1984) ("Although the statute says that a court may 'request' an attorney to represent an indigent defendant, the cases construe the statute as authorizing a court to 'appoint' counsel."); *McKeever v. Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982) ("Defendants maintain that there was no abuse of discretion because section 1915(d) merely allows a court to 'request' counsel rather than to 'appoint' counsel, but the vast weight of authority in this circuit and elsewhere demonstrates that the power of a court to provide counsel is commonly referred to as power to appoint.", footnotes omitted).

Petitioner incorrectly characterizes the Eighth Circuit decision as "standing alone", and correctly points to *United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986), which expressly rejects the statutory interpretation of section 1915(d) by the Eighth Circuit.[3] The necessity

---

[2]Although not asserted by the District Court as justification for its challenged Order, it has been suggested that the District Court may have inherent power to appoint when constitutional rights are involved. See 20 Am.Jur.2d Courts § 79 (1965), *United States v. 30.64 Acres of Land*, 795 F.2d 796, 804 (9th Cir. 1986), n. 16. This potential to avoid the statutory construction issue provides further justification for the denial of the interlocutory petition for mandamus.

[3]Rational legal arguments exist in contradiction to the decision in *Land*. A basis for the Ninth Circuit decision appears to be its belief that there is no provision for payment of these appointments, in apparent disregard of 42 U.S.C. § 1988. That statute providing for payment of fees of prevailing parties is

(Continued on following page)

for certiorari jurisdiction is to resolve conflicts among the circuits on issues of special importance. Supreme Court Rule 17.1. Characterized correctly, there is no conflict to resolve. The denial of the petition for mandamus was, at the time and in its context, the correct decision.

In a factually similar case, *Lewis v. Lane*, 816 F.2d 1165 (7th Cir. 1987), counsel upon learning of his appointment, immediately asked the magistrate to be relieved, alleging incompetency to handle federal civil rights litigation and lack of time. The magistrate denied his request and counsel eventually accepted the appointment "after the magistrate indicated that his membership in the southern district bar might be terminated if he declined the assignment." *Id.* at 1166. The Seventh Circuit acknowledged the inconsistency in their interpretation of § 1915(d), citing *Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982), *cert. denied*, 459 U.S. 1214, 103 S.Ct. 1212, 75 L.Ed.2d 451 (1983) and *McKeever v. Israel*, 689 F.2d 1315, 1319, n. 8 (7th Cir. 1982).

> We need not choose a definitive definition of "request" in this case because even if consent is required before an appointment is valid under § 1915(d), Adams validly consented to accept the representation of the plaintiffs in this case. . . . Although Adams was a reluctant appointee, he did validly consent to represent the plaintiffs. . . . The Southern District of Illinois requires that members of the bar of that court "be available for appointment by

---

(Continued from previous page)

significant in the context of § 1915. At the time of appointment of counsel, the Court has concurrently determined the claims to be not frivolous.

> the court to represent or assist in the representation of those who cannot afford to hire an attorney" . . . [r]eminding an attorney of the consequences of failing to abide by the rules of the district bar of which he is a member does not vitiate the validity of his subsequent consent to follow those rules.

Lewis v. Lane, 816 F.2d 1165, 1168-1169 (7th Cir. 1987).[4]

Petitioner's Appointment Was Part Of A District-Wide Process

As described in his ruling in *Coburn v. Nix*, appendix p. 2a, the District Court of Iowa in response to an Eighth Circuit directive, established a process for appointment of counsel similar to that in *Lewis*. It was from the list of federal practitioners that Petitioner's name was selected for appointment in this case. Although the bar has long recognized its professional duty to provide pro bono representation, which duty is acknowledged by the Petitioner, obviously the fulfillment of that obligation falls upon the individual lawyer.[5] Provision of legal services without fee constitutes a hardship of varying degrees.

---

[4]The Seventh's Circuit's position on eligibility requirements was perhaps foretold in *Branch v. Cole*, 686 F.2d 264, 267 (5th Cir. 1982): "If the court continues to have difficulty in obtaining the voluntary service of counsel despite their ethical responsibilities, it may wish to limit the compensated practice by members of its bar to those willing to accept their share of indigent cases."

[5]Ethical Consideration 2-25 of the American Bar Association Code of Professional Responsibility.

> We find merit in the reasoning that there is an implied obligation to perform pro bono trial services on every licensed attorney who is engaged in litigation, not just those who are willing to come forward.

Matter of Snyder, 734 F.2d 334, 339 (8th Cir. 1984). The attorney appointment process implemented by the district court spreads the risk of that hardship, makes more efficient and effective the utilization of practicing attorneys and is soundly rooted in the ethical obligation of each.[6]

Whether Petitioner's service was by appointment or by consent to a federal bar requirement, a rational and substantial legal argument existed in support of the District Court denial of the "motion to dismiss". More importantly, the existence of those rational and substantial legal arguments in support of the position of the District Court not only justified but required that the petition for mandamus be denied by the Eighth Circuit.

---

[6]The Ninth Circuit prior to its decision in *United States v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986), apparently held a similar view:

> "An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order."

United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied*, 382 U.S. 978 (1966).

Supreme Court Rules 17 and 18 Suggest Denial Of This Petition.

While the question identified by the Petitioner may ultimately be reached on appeal in this underlying action, it is not now the appropriate question presently presented for review by certiorari. Supreme Court Rule 17 requires special and important reasons for the exercise of judicial discretion in granting the writ. Additionally, Supreme Court Rule 18 requires demonstration of "an imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." *Traman, et al., v. Parkin* is still pending in the District Court. Review of a preliminary motion was attempted by Petitioner through interlocutory appeal, a statutory prerequisite for which was denied. The petition for writ of mandamus was then utilized in lieu of interlocutory appeal. Denial of the mandamus results now in a petition in certiorari. Petitioner has failed to show any justification for deviation from the normal appellate process, recognized by Judge Vietor in his order denying the request for inclusion of the 28 U.S.C. § 1292 statement. This petition for certiorari is simply premature. The decision of the Eighth Circuit on the petition for mandamus is not in conflict with the decision of another court of appeals but is in substantial conformity with Supreme Court precedent. *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 101 S.Ct. 188, 66 L.Ed.2d 193 (1980). There is no justification for any further interruption in *Traman, et al., v. Parkin, et al.*

CONCLUSION

For all the foregoing reasons, the petition in certiorari should be denied.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General

APPENDIX I

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JOHN COBURN,
Plaintiff,

v.

CRISPUS NIX, et al.,
Defendants.

* CIVIL NO. 86-716-B
* RULING DENYING
* MOTION TO DISMISS
* APPOINTMENT OF
* COUNSEL AND ORDER
* DISSOLVING STAY
*
* (Filed June 16, 1987)
*

The court has before it a motion of attorney John D. Cruise to dismiss his appointment under 28 U.S.C. § 1915(d) as counsel for plaintiff. Cruise contends that the court has no power to compel him to serve as counsel for plaintiff.

Plaintiff, an indigent inmate at the Iowa State Penitentiary, brought this action under 42 U.S.C. § 1983 against various prison officials and health care providers alleging inadequacies in health care and living conditions at the penitentiary. After plaintiff's complaint was filed, he asked to have a lawyer appointed. On October 23, 1986 this court ordered the clerk of court to find counsel to represent plaintiff pursuant to 28 U.S.C. § 1915(d). The Volunteer Lawyers Project[1] reported on October 30, 1986 that John D. Cruise had been contacted and was assigned to represent plaintiff.

---

[1]The Volunteer Lawyers Project is a joint venture by the Iowa State Bar Association and Legal Services Corporation of Iowa.

After Cruise filed his motion, the court invited the Volunteer Lawyers Project to file an amicus curiae brief, which the Volunteer Lawyers Project did.

THE ATTORNEY APPOINTMENT PROCESS

Before addressing the merits of the motion it will be useful to explain the process by which attorney Cruise was appointed. In *Nelson v. Redfield Lithographic Printing* Chief Judge Lay, writing on the judge's duty to secure legal assistance for the poor, explained:

> We write here under our general supervisory authority involving the district courts. We think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

728 F.2d 1003, 1005 (8th Cir. 1984).

In response to this directive, the judges of this court had the clerk of court prepare a list of attorneys from which section 1915(d) appointments were to be made. Initially, the list was composed of lawyers admitted to practice in this court who had been counsel of record in federal court in connection with five or more civil cases in 1982. Because this list provided a relatively small number of lawyers to bear the brunt of the pro bono assignment load, the list was expanded. Now any attorney admitted to practice in the Southern District of Iowa and in good standing who has appeared as counsel in a

nonbankruptcy federal case in the past five years is eligible for appointment. An alphabetized list of these attorneys was divided into three panels. All appointments for a given year are made out of one panel. Attorneys are asked to serve on a rotating basis within the panel, and the panels are on a three year rotation cycle. Therefore, no attorney should be unfairly burdened with appointments.[2]

A request for appointed counsel is subjected to judicial scrutiny under the following standards. First, the party must be indigent. Second, indigents who are not incarcerated must certify their efforts to contact and hire an attorney. (This requirement is waived for inmates.) Third, the complaint must not be frivolous or fail to state a claim. (A failure to meet this standard results in dismissal on initial review pursuant to Fed. R. Civ. P. 12(b)(6) or 28 U.S.C. § 1915(d).) Fourth, the judge weighs the complexity of the case, whether the facts need further development, and whether plaintiff appears to be capable of presenting the case in a orderly fashion. *See In Re Lane,*

---

[2]Further accommodations are made to insure that attorneys are not burdened by pro bono appointments. Attorneys who have accepted pro bono cases in state court within the preceding year are not asked to take a federal appointment. Also, if an attorney has a busy schedule when called, the Volunteer Lawyers Project will permit the attorney to defer appointment to a time where the attorney's schedule will permit. Finally, some consideration is given to the distance the attorney would have to travel to represent a client. An attorney in southwest Iowa, for example, would be appointed to represent someone in a county jail somewhere in that region rather than an inmate at the Iowa State Penitentiary in Fort Madison in southeast Iowa.

801 F.2d 1040, 1042-45 (8th Cir. 1986). The court orders appointment of counsel only if all of these criteria are met. The clerk of court then sends a copy of the order to find counsel to the Volunteer Lawyers Project.

COURT POWER TO APPOINT ATTORNEYS TO REPRESENT INDIGENT CIVIL LITIGANTS

Cruise does not seek leave to withdraw for good cause pursuant to Local Rule 1.5.7. Rather, he makes a frontal challenge to the court's power to appoint him to represent plaintiff. First, Cruise argues that the court lacks power to appoint attorneys to represent inmates in suits under section 1983. Second, he argues that if the court has such a power, it is limited to "active litigators", which Cruise professes not to be. Therefore, he argues, the court did not have power to appoint him to represent plaintiff, and the appointment should be dismissed, or otherwise dissolved. This court rejects both contentions.

Congress has authorized courts to obtain legal counsel for indigent plaintiffs in civil actions. "The court may request an attorney to represent any such person unable to employ counsel. . . ." 28 U.S.C. § 1915(d). Cruise contends that section 1915(d) grants no coercive power to the court, but only provides the power to "request". The Eighth Circuit Court of Appeals has rejected this interpretation:

> The district court ruled that it had no *power* to appoint counsel to represent an indigent in civil cases. This ruling overlooks the express authority given it in 28 U.S.C. § 1915 to appoint counsel in civil cases. This court and other courts of appeals regularly make these appointments in habeas corpus and civil rights cases.

Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971) (per curiam) (footnote omitted). *See also In Re Lane*, 801 F.2d 1040, 1043 (8th Cir. 1986); *Hahn v. McLey*, 737 F.2d 771, 774 (8th Cir. 1984) (per curiam); *Nelson v. Redfield Lithographic Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984). The Fourth Circuit Court of Appeals recently noted that, "[a]lthough the statute says that a court may 'request' an attorney to represent an indigent defendant, the cases construe the statute as authorizing the court to 'appoint' counsel." *Whisenaut v. Yuam*, 739 F.2d 160, 163 n.3 (4th Cir. 1984). Other courts construing the statute have viewed the statute as empowering the court to appoint a lawyer. *See Hodge v. Police Officers*, 802 F.2d 58, 60-62 (2d Cir. 1986); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982); *McKeever v. Israel*, 689 F.2d 1315, 1319 (7th Cir. 1982). *But see Caruth v. Pinkney*, 683 F.2d 1044, 1049 (7th Cir. 1982) ("a court has the authority only to *request* an attorney to represent an indigent, not to require him to do so.") (emphasis in original), *cert. denied*, 459 U.S. 1214 (1983). This court concludes that the appointment of Cruise is authorized by the power granted by Congress in 28 U.S.C. § 1915(d).

The section 1915(d) appointment power is consistent with every attorney's ethical obligation to provide legal services to the poor. The Iowa Code of Professional Responsibility For Lawyers provides: "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer." Iowa Code of Professional Responsibility For Lawyers EC 2-27. Attorneys admitted

to practice in the Southern District of Iowa take an Oath of Admission that provides in part: "I do solemnly swear . . . I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, . . . so help me God." Local Rule 1.5.5.

Cruise also argues that if the court has power to appoint, the power is limited to "active litigators." This limitation is nowhere expressed in any case authority cited by Cruise or found by this court. When the Eighth Circuit Court of Appeals has written on appointments under 28 U.S.C. § 1915(d), the court has not expressed or implied such a limit. On the contrary, the court has stressed the necessity to provide "competent" representation. *See Nelson*, 728 F.2d at 1005.[3]

Even if the court's power were limited to appointing "active litigators", Cruise could not evade appointment on the ground that he is not an active litigator. He has participated as counsel more than once recently in contested litigation in this court. *Amy Chu, a minor, by her next friend and guardian Robert Chu, v. The Iowa City Community School Board, et al.*, Civil No. 84-73-D-1; *Barbara and Darrell B., as next friends of Drew B., v. Dr. Robert Benton, et al.*, Civil No. 84-97-D-2; *Area Education Agency, et al., v. Stephen Smith, et al.*, Civil No. 84-370-B. Just a few months ago, in *Area Education Agency*, a case tried by me, he actively participated in a three day trial of a factually and

---

[3]Rules governing admission to practice in this court and requiring continuing legal education are designed to assure a minimal level of competence among members of the federal bar. Cruise has satisfied these requirements and is presumed competent.

legally complex case. He cross-examined witnesses. He signed and filed a forty page trial brief, and he cosigned with other counsel and submitted a twenty-two page proposed findings of fact and conclusions of law.

RULING AND ORDER

In sum, the court's appointment of Cruise to represent plaintiff is authorized by section 1915(d). The motion to dismiss appointment of counsel is denied. The order staying proceedings pending disposition of the motion to dismiss appointment of counsel is dissolved.

DATED this 16th day of June, 1987.

/s/Harold D. Vietor
HAROLD D. VIETOR,
Chief Judge
Southern District of Iowa

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN, et al., Plaintiffs,	* CIVIL NO. 87-317-B
v.	* RULING
STEVE PARKIN, et al., Defendants.	* DENYING * REQUEST TO * AMEND AND * APPLICATION * FOR STAY

(Filed November 5, 1987)

John E. Mallard, plaintiff Traman's court-appointed counsel, has filed a request to amend order to include statement prescribed by 28 U.S.C. section 1292(b) and application for stay order.

Rule 1292(b) provides in part:

> When a district judge, in making an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

I believe there is substantial ground for difference of opinion. However, I do not believe that an immediate appeal from my ruling would materially advance the

ultimate termination of this litigation, which is Mr. Traman's litigation against the defendants.

Therefore Mr. Mallard's request to amend order and his application for stay of order are denied.

DATED this 5th day of November, 1987.

/s/Harold D. Vietor
HAROLD D. VIETOR,
Chief Judge
Southern District of Iowa

(3)

No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

Counsel for Petitioner

July 21, 1988

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

BRIEF IN REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioner John E. Mallard respectfully submits this reply brief in response to arguments first raised in the brief in opposition to the petition for writ of certiorari filed by Respondent United States District Court for the Southern District of Iowa.

STATEMENT OF THE CASE[1]

The Respondent incorrectly states that the Petitioner's application to the Eighth Circuit for a writ of mandamus "was filed in lieu of an interlocutory appeal in a case still pending in the District Court." Brief in Opposition, p. 4 (emphasis added). The petition for mandamus was not filed in lieu of an interlocutory appeal; the petition was filed because an interlocutory appeal was not available. Appendix to Brief in Opposition, p. 8a. Because an interlocutory appeal was not available, the District Court suggested to the Petitioner in a letter dated November 4, 1987 (p. 1a, infra) that the Petitioner "could obtain appellate review of [the order denying the motion to dismiss the appointment of counsel] by a mandamus proceeding."

The Eighth Circuit denied the Petitioner's application for a writ of mandamus. Petition for Writ of Certiorari, 1a. Based upon the Petitioner's argument to the Eighth Circuit that there was substantial authority in support of the legal proposition that 28 U.S.C. Section 1915(d) does not authorize a court to require an unwilling attorney to represent an indigent person, however, the Eighth Circuit granted the Petitioner's application for a stay of District Court proceedings pending the disposition of Petitioner's application for a writ of certiorari. Appendix to this Reply Brief, p. 3a.

---

[1]The Statement of the Case in the Petition for Writ of Certiorari was kept brief in an effort to comply with Supreme Court Rule 21.1(g). In light of the Respondent's view of the importance of the procedural history of this case, however, the Petitioner now finds it necessary to supplement the Statement of the Case.

REASONS FOR GRANTING THE WRIT

I.

The Eighth Circuit's holding was based upon its incorrect interpretation of 28 U.S.C. Section 1915(d) and not upon any finding that the petition for mandamus was premature or inappropriate.

The Respondent argues that the petition for mandamus was premature and inappropriate, and concludes that it was denied based on a finding that adequate alternative remedies existed, including an appeal from final judgment.[2] The Respondent fails to appreciate that if the Petitioner were compelled to undertake the representation of the indigent prisoners and continue to final judgment, the Petitioner would not have

---

[2]"Petitioner has failed to show any justification for deviation from the normal appellate process . . . . This petition for certiorari is simply premature." Brief in Opposition, p. 11.

an effective remedy in seeking the dismissal of his appointment. It is difficult to understand why the Respondent District Court makes this argument when its Chief Judge had suggested to the Petitioner in a letter dated November 4, 1987 (p. 1a, infra) that appellace review could be obtained by a mandamus proceeding.

In addition, the record of proceedings in the Eighth Circuit does not support the Respondent's assertion that the Eighth Circuit denied the petition for mandamus on the grounds that the Petitioner would have an opportunity to appeal a final judgment in the underlying action. In granting the Petitioner's application for a stay of District Court proceedings pending an application for a writ of certiorari (p. 3a, infra), the Eighth Circuit

recognized that its denial of the petition for mandamus constituted a substantive judgment with respect to the meaning of Section 1915(d), and that the Petitioner's only opportunity to obtain an effective remedy would be through a petition for a writ of certiorari.

II.

The Eighth Circuit's determination that 28 U.S.C. Section 1915(d) empowers a federal court to require an unwilling attorney to serve as counsel conflicts with decisions of other Circuits.

The Respondent asserts that the Eighth Circuit is not alone in its construction of Section 1915(d). This is incorrect. No case cited in the Brief in Opposition involves a ruling like the decision below which effectively holds that an unwilling attorney can be compelled to serve as counsel under Section 1915(d).

The Respondent cites Lewis v. Lane,

816 F.2d 1165 (7th Cir. 1987), as authority in support of the Eighth Circuit's interpretation of Section 1915(d). However, contrary to the Respondent's assertion that the Lewis case is "factually similar" to the instant case (Brief in Opposition, p. 8), the Lewis case involved an attorney who consented to accept an appointment under Section 1915(d). Lewis v. Lane, 816 F.2d 1165, 1168 (7th Cir. 1987). Furthermore, the Seventh Circuit in Lewis again acknowledged its interpretation of Section 1915(d) by stating that "the use of the word 'request' rather than 'appoint' suggests that the attorney's consent is required." Id. at 1168. See also Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to

represent an indigent, not to require him to do so") (emphasis in original).

III.

Supreme Court Rules 17 and 18 suggest that this petition should be granted.

Supreme Court Rule 17.1(a) provides that review on certiorari will be granted only when there are special and important reasons therefor, such as a conflict in decisions among Circuits. Contrary to the argument made by Respondent, the decision below conflicts with decisions of the Fifth, Sixth, Seventh, and Ninth Circuits. Petition for Writ of Certiorari, p. 8-13.

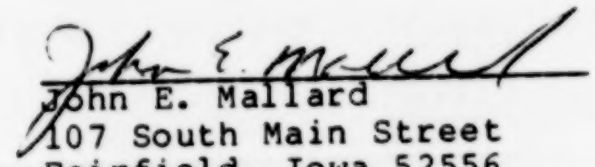
Supreme Court Rule 18 provides that review on certiorari before judgment will be allowed only when there is justification to deviate from normal appellate practice. Contrary to the Respondent's argument, the Petitioner's

only opportunity to obtain an effective remedy, i.e., a dismissal of his appointment, is by the petition for writ of certiorari, prior to being compelled to represent the indigent prisoners in the underlying action.

CONCLUSION

For these various reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,



John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
Counsel for Petitioner

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

Chambers of
HAROLD D. VIETOR
Chief Judge
United States Courthouse
East First and Walnut
Des Moines, Iowa 50309

November 4, 1987

John E. Mallard
Marcus & Mallard, P.C.
107 South Main Street
Fairfield, Iowa 52556

Re: Civil No. 87-317-B - Traman, et al. v. Parkin, et al.

Dear Mr. Mallard:

My law clerk advises me that you called to request that I make a certification under 28 U.S.C. Section 1292(b) in connection with my ruling denying your motion to dismiss your appointment of counsel.

I believe there is substantial

ground for difference of opinion. However, I cannot in good faith state that I believe that an immediate appeal from my ruling would materially advance the ultimate termination of the litigation, which would be Mr. Traman's litigation against the defendants. Therefore, I cannot in good conscience make a section 1292(b) certification.

Perhaps you could obtain appellate review of my order by a mandamus proceeding.

Sincerely,

/s/ Harold D. Vietor

UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2583

In Re: John E. Mallard,

Petitioner.

* PETITION FOR WRIT OF MANDAMUS

Petitioner Mallard's application for a stay of district court proceedings in case No. 87-317-B, Mark Allen Traman, et al. v. Steve Parkin, et al., pending the disposition of an application for a writ of certiorari to the Supreme Court is granted.

February 8, 1988

A true copy.

ATTEST: /s/ Robert St. Vrain
CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JOINT APPENDIX

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945
Counsel for Petitioner

Thomas J. Miller
Attorney General of Iowa
Gordon E. Allen
Deputy Attorney General
Second Floor
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164
Counsel for Respondent

PETITION FOR CERTIORARI FILED MARCH 5, 1988
CERTIORARI GRANTED OCTOBER 3, 1988

TABLE OF CONTENTS

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

May 28, 1987--Order To Find Counsel entered by the U.S. District Court for Southern District of Iowa, Central Division.

June 11, 1987--Report To Court On Appointment of Counsel filed by Volunteer Lawyers Project.

June 26, 1987--Petitioner's Motion To Withdraw filed.

July 6, 1987--Response Of Amicus Curiae, The Volunteer Lawyers Project To Motion To Withdraw filed.

July 6, 1987--Affidavit Of Dennis Groenenboom filed.

July 7, 1987--Order entered denying Petitioner's Motion To Withdraw.

July 13, 1987--Order entered extending Petitioner's time to file notice of appeal.

July 29, 1987--Petitioner's Statement Of Appeal Of Denial Of Motion To Withdraw and Motion To Dismiss Appointment Of Counsel filed.

July 29, 1987--Petitioner's Brief In Support Of (1) Appeal Of Denial Of Motion To Withdraw And (2) Motion To Dismiss Appointment Of Counsel filed.

July 29, 1987--Affidavit Of John E. Mallard filed.

October 27, 1987--Ruling On Motion entered denying Petitioner's Appeal Of Motion To Withdraw and Motion To Dismiss Appointment Of Counsel.

November 5, 1987--Petitioner's Request To Amend Order To Include Statement Prescribed By 28 U.S.C. Section 1292(b) and Application For Stay Of Order filed.

November 5, 1987--Ruling entered denying Petitioner's Request To Amend and Application For Stay.

November 27, 1987--Petitioner's Petition For Writ Of Mandamus filed in U.S. Court of Appeals for the Eighth Circuit.

December 7, 1987--Order entered denying Petitioner's Petition For Writ Of Mandamus.

December 23, 1987--Order To Appear entered by U.S. District Court ordering Petitioner to appear on behalf of Plaintiffs.

December 30, 1987--Petitioner's Application For Stay Of Order To Appear filed in U.S. District Court.

December 30, 1987--Petitioner's Memorandum In Support Of Application For Stay Of Order To Appear filed.

January 21, 1988--Ruling entered by U.S. District Court denying Petitioner's Application For Stay Of Order To Appear.

January 28, 1988--Petitioner's Application For Stay of Order To Appear filed in U.S. Court of Appeals.

February 8, 1988--Order entered by U.S. Court of Appeals granting Petitioner's Application For Stay of Order To Appear.

February 10, 1988--Order entered by U.S. District Court staying all proceedings.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN et al., Plaintiffs

v.

STEVE PARKIN, et al., Defendants

Civil No. 87-317-B

MOTION TO WITHDRAW
Filed June 26, 1987.

COMES NOW, John E. Mallard, Marcus & Mallard, P.C., 107 South Main Street, Fairfield, Iowa 52556 and pursuant to Local Rule 1.5.7 moves to withdraw from the representation of Plaintiffs for the following reasons:

1. On or about June 3, 1987, I received a telephone call from Dennis Groenenboom of the Volunteer Lawyers Project, Des Moines, Iowa. Mr. Groenenboom advised me that I had been selected to represent the Plaintiffs in

the above-captioned case and briefly described the nature of the claims made in this case. I advised Mr. Groenenboom that I had no experience in representing plaintiffs in cases of this nature and asked whether he could reconsider my selection. Mr. Groenenboom advised me that I had been selected on a lottery basis and that he would send the file to me. I never agreed to take on the representation of the Plaintiffs in this case but decided that I would receive the file so that I could review it and learn more about the case.

2. Upon receipt of the file I reviewed it and determined that the case involved allegations by prisoners at the Iowa State Penitentiary in Fort Madison, Iowa, that they were requested to act as informants by prison guards and administrators and that the prison guards and administrators failed to preserve the

confidentiality of the Plaintiffs' role as informants and also retaliated against Plaintiffs for certain other reasons. The case involves three Plaintiffs and eight Defendants including prison guards and prison administrators, and Plaintiff Traman has indicated that there may be additional defendants. Based upon my review of the case, it appears that in order to establish the facts of the case, counsel for Plaintiffs will need to depose numerous Defendants and other witnesses. It also appears that counsel for Plaintiffs will need to examine and cross examine numerous parties and witnesses at trial.

3. In light of the nature of this case and the fact that I have no experience in this type of litigation which requires substantial discovery by deposition and a trial with many parties

and witnesses, I called Patricia Lapointe of the Volunteer Lawyers Program, Des Moines, Iowa on June 22, 1987 and asked her if I could withdraw from the representation of the Plaintiffs and substitute as counsel in another case which involved an area of practice which I understood, such as bankruptcy law or securities law. She mentioned that it is possible to be relieved of any obligation under the Federal pro bona referral program by signing up for other volunteer lawyers projects with the legal services program and that I might provide debt counseling, etc. However, Ms. Lapointe said that, in light of the fact that my name had been given to the court, I would need to make a motion to the court to withdraw.

4. I have no experience in litgation in cases such as the subject case which involves multiple plaintiffs

and defendants and requires substantial depositions and an ability to prepare, examine, and cross examine numerous parties and witnesses at trial.

. . .

M. I am willing to volunteer my services for other volunteer lawyers projects with the legal services program, in lieu of participating in the federal pro bona referral program for which I am not qualified.

WHEREFORE, I request that this Motion To Withdraw as counsel for Plaintiffs in the above captioned case be granted.

Dated this 25th day June, 1987.

/s/ John E. Mallard
Marcus & Mallard,
P.C.
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

IN THE UNITED STATES DISTRICT COURT
IN THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN, et al., Plaintiffs

v.

STEVE PARKIN, et al., Defendants

Civil No. 87-317-B

RESPONSE OF AMICUS CURIAE,
THE VOLUNTEER LAWYERS PROJECT
TO MOTION TO WITHDRAW
Filed July 6, 1987.

COMES NOW, the Volunteer Lawyers Project, Amicus Curiae, and responds to the Motion to Withdraw signed by Attorney John E. Mallard on June 25, 1987 in regard to the above captioned case.

Mr. Mallard moves to withdraw under local Rule 1.5.7. The case involves an inmate of the Iowa State Penitentiary and it is a civil case brought under 42 U.S.C. Section 1983. The plaintiff sought representation of counsel pursuant to 28 U.S.C. Section 1915(d). Mr.

Mallard was appointed to represent the plaintiff by the Volunteer Lawyers Project pursuant to court order.

Local Rule 1.5.7 provides that an attorney may withdraw from a case for "good cause shown." Mr. Mallard, in his motion, details his legal experience and seems to protest this appointment based on his lack of similar experience.

As Mr. Mallard states in his motion he graduated from law school in 1980. He practiced in California from May 1981 through April 1983. During that time he was involved in creditor/debtor proceedings in state courts and acted as assistant counsel on several actions involving contract law. He was also involved in one deposition and participated in one trial.

For approximately one year from April 1983 to May 1984 he was in-house counsel to United Investment Groups. He

assisted in structuring and preparing private placement memoranda for securities offering involving research and development limited partnerships. His current practice has been primarily in the organization and capitalization of businesses. He states that the principal area of his expertise is in the structuring and preparation of documents for security offerings and that substantially all of his time is spent representing business clients and clients who own or are developing real property.

More recently, Mr. Mallard has been associated with the law firm of Marcus & Mallard, P.C., in Fairfield, Iowa, since May 1984. Mr. Mallard has appeared as counsel of record in 3 federal cases in the Southern District of Iowa since January 1987. In connection with these cases he has consulted from time to time

with attorney Tom Zurek of Des Moines.

The recitation of the above facts plus others found in his Motion belie Mr. Mallard's seeming cry to the court that he is not competent to handle this case. In fact, Mr. Mallard sets out at the end of paragraph 2 of his Motion a plan for proceeding with the litigation of this case.

The 8th Circuit Court of Appeals in the case Matter of Snyder, 734 F2d 334 (1984) dealt with a similar situation. In the Snyder case an attorney appointed to represent a criminal defendant pursuant to the Criminal Justice Act communicated to the court that he wished to be taken off the list of attorneys willing to accept appointments in indigent cases. Snyder at 336.

In dealing with Mr. Snyder's objection, the court also discussed the efficacy of any plan which depends

totally upon voluntary participation. Snyder at 339. The court states as follows:

> "We find merit in the reasoning that there is an implied obligation to perform pro bono trial services on every licensed attorney who is engaged in litigation, not just those who are willing to come forward . . . Also, appointing only those who feel they have competence in criminal cases in no way assures competency; it is common knowledge that many counsel appointed by district courts under the C.J.A are young lawyers just out of law school trying to gain early experience in the trial of cases."

Even though the Snyder case involved a criminal appointment the reasoning is applicable to Mr. Mallard's Motion in that the court essentially seems to expect attorneys, no matter what their level of experience is, to do the work necessary to handle a case competently.

The 8th Circuit is absolutely clear that court appointed counsel is

appropriate in the civil context.

> "We have recently stated that when an indigent presents a colorable civil claim to the court, the court, upon request, should order the appointment of counsel from the Bar. Nelsen v. Redfield Lithograph Printing, 728 F2d 1003 (8th Cir. 1984). This procedure should be made applicable to claims brought by prisoners. Thus, once a district court is satisfied that the prisoner has alleged a prima facie case, counsel should be appointed upon request unless the prisoner wishes to represent him or herself." Hahn v. McLey 737 F2d at 774 (8th Cir. 1984).

Mr. Mallard concludes his Motion at paragraph 4 (M) with an offer to join the Volunteer Lawyers Project (VLP) in lieu of participating in the Federal pro bono Referral Program. The Volunteer Lawyers Project is a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association. Since February 1986 the VLP has been placing civil pro bono assignments for the federal courts

in both the Southern and Northern Districts of Iowa. The current policy is that only attorneys who have previously signed up for the Volunteer Lawyers Project are passed over when a federal referral is being placed. Attorneys are not given the option of signing up for the Volunteer Lawyers Project in lieu of taking a federal referral at the time the phone call is made to place the case.

A change in this policy is currently under consideration by the Volunteer Lawyers Project since the logical extension of the current policy is that all attorneys could sign up for the Volunteer Lawyers Project and no one would be left to accept federal referrals. Therefore, the policy may be changed such that all attorneys with some federal court experience (other than bankruptcy) may be requested to handle federal referrals nonwithstanding their

involvement with the Volunteer Lawyers Project.

Currently, only attorneys who have some federal court experience, other than bankruptcy, are called on for these assignments. Clearly, Mr. Mallard meets this requirement. See attached Affidavit of Dennis Groenenboom for a description of the procedure followed in the placement of this case.

The court has the power to appoint counsel in civil cases pursuant to Hahn and Nelsen and 28 U.S.C. Section 1915(d). In addition, attorneys admitted to practice in the Southern District of Iowa take an Oath of Admission that provides in part:

> "I do solemnly swear . . . that I will never, reject from any consideration personal to myself, the cause of the defenseless or oppressed, . . . so help me God." Local Rule 1.5.5.

Also, the 8th Circuit in the Snyder case states at 338:

> "The term "profession", it should be borne in mind, as a rule is applied to a group of people pursuing a learned art as a common calling in the spirit of public service where economic rewards are definitely an incidental, though under the existing economic conditions undoubtedly a necessary by-product. In this a profession differs radically from any trade or business which looks upon money-making and personal gain as its primary purpose. The lawyer cannot possible get away from the fact that this is a public task..." State ex rel. Wolff v. Ruddy, 617 S.W.2d 64, 65-66 (Mo. 1971) (quoting Anton-Hermann Chroust, 1 The Rise of the Legal Profession in America x-xi (1965) cert. denied, 454 U.S. 1142, 102 S.Ct. 1000, L.Ed.2d 293 (1982).

Therefore, although Mr. Mallard's practice has been primarily in the field of business law, since he is a member of the bar he has an ethical duty to represent the indigent inmate, Mr. Traman.

CONCLUSION

It would appear from his own statements that Mr. Mallard is competent to handle this case, that he was appointed to do so consistent with the current policies of the Volunteer Lawyers Project, and that ethical considerations demand that he not be allowed to withdraw.

Respectfully submitted,

/s/ Patricia R. Lapointe
Managing Attorney
Volunteer Lawyers Project

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN, et al., Plaintiffs

v.

STEVE PARKIN, et al., Defendants

Civil No. 87-317-B

BRIEF IN SUPPORT OF
(1) APPEAL OF DENIAL OF
MOTION TO WITHDRAW AND
(2) MOTION TO DISMISS
APPOINTMENT OF COUNSEL
Filed July 29, 1987.

COMES NOW, Attorney John E. Mallard and submits the following Brief In Support of Appeal and Motion.

. . .

II

MAGISTRATE LONGSTAFF ABUSED HIS DISCRETION IN DENYING ATTORNEY MALLARD'S MOTION TO WITHDRAW BECAUSE MALLARD IS NOT COMPETENT TO REPRESENT PLAINTIFFS

The Eighth Circuit has recognized that attorneys representing indigents under 28 U.S.C. Section 1915(d) must be "competent."

> "We think it incumbent upon the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented."

Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984) (emphasis added).

In so ruling, it appears that the Eighth Circuit intended that any powers exercised by this Court pursuant to 28 U.S.C. Section 1915(d) be circumscribed by Canon 6 of the Code of Professional Responsibility. The Iowa Code of Professional Responsibility as adopted by the Iowa Supreme Court provides that "A lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without

associating with him a lawyer who is competent to handle it." Disciplinary Rule 6-101(A)(1). "He . . . should accept employment only in matters which he is or intends to become competent to handle." Ethical Consideration 6-1. "While the licensing of a lawyer is evidence that he has met the standards then prevailing for admission to the bar, a lawyer generally should not accept employment in any area of the law in which he is not qualified." Ethical Consideration 6-3. While Canon 2 of the Code of Professional Responsibility encourages attorneys to make legal counsel available by serving the disadvantaged and rendering free legal services, it does so in a context which recognizes that "Employment should not be accepted by a lawyer when he is unable to render competent service." Cf. Ethical Considerations 2-27 and 2-32.

This case involves claims alleged under 42 U.S.C. Section 1983 by three inmates at the Iowa State Penitentiary in Fort Madison, Iowa. The case has been brought against eight Defendants, including prison guards and other officials, and Plaintiff Traman has indicated that there may be additional defendants. Plaintiffs allege that Defendants have systematically filed false disciplinary reports against them and have endangered their lives by exposing their role as informants. A review of the pleadings filed indicates that substantial discovery will be required to unravel the facts and that many material facts are likely to be disputed. (If the material facts were not disputed, then certain of the Defendants would have stepped forward and would likely have been dismissed based

upon Plaintiffs' allegations.)

In light of the numerosity of the parties and the disputed facts, the successful prosecution of this case on behalf of Plaintiffs would appear to depend upon the ability of counsel for Plaintiffs to solicit testimony from Defendants and discover inconsistencies and/or unbelievable statements. In this regard, it is key that counsel for Plaintiffs be skilled at deposing and cross-examining witnesses, and at trial techniques which highlight the weaknesses of Defendants' testimony.

The background of Attorney Mallard demonstrates that Mallard is not competent to represent Plaintiffs in a case as complex as the instant case. Mallard has no experience in litigation involving numerous parties and disputed facts, which litigation requires skill in (i) deposition and other discovery

techniques, (ii) cross-examination, and (iii) trial techniques. Furthermore, Mallard has testified that he does not like the confrontational nature of litigation and, for this reason, lacks confidence in his ability to effectively represent Plaintiffs.

In determining an attorney's competence in a particular field, a court might rightly inquire regarding such attorney's ability to learn a new area of practice. It should be noted that, although Attorney Mallard has no experience in interpreting the law under 42 U.S.C. Section 1983, Mallard does not argue that he should be allowed to withdraw from the representation of Plaintiffs on these grounds. Mallard is experienced in construing "difficult" statutes and regulations in connection with his corporate and securities

practice, and such skill should be easily transferrable to a civil rights statute. The Eighth Circuit has made a similar point in stating that "Lawyers who specialize in civil cases must necessarily engage in a diversity of study in all spheres of our social, political, and economic systems. The step across to the criminal law, by the experienced civil trial attorney, is really no step at all." In Re Snyder, 734 F.2d 334, 340 (8th Cir. 1984).

However, while an attorney might have some obligation to learn new areas of law and enhance his legal abilities so that he will become competent to undertake a particular representation, Attorney Mallard submits that it is not appropriate to expect a non-litigator to become a litigator. Thus, the Eighth Circuit in Snyder did not state that business lawyers should make a

transformation to become criminal lawyers; rather, the Eighth Circuit stated that "The step across to the criminal law, by the experienced civil trial attorney, is really no step at all." Snyder at 340 (Emphasis added).

This Court recognized the difference between litigators and non-litigators when, in response to the Eighth Circuit's directive in Nelson at 1005 "to obtain a sufficient list of attorneys . . . who will serve in pro bono situations," this Court had the clerk of court prepare a list of attorneys who had been counsel of record in federal court in connection with five or more civil cases in 1982. While this list was subsequently expanded to include any attorney admitted to practice in the Southern District of Iowa and in good standing who had appeared as counsel in a nonbankruptcy federal case

in the past five years, in an effort to prevent pro bono assignments from becoming burdensome to a relatively small number of lawyers, this method of selection in no way eliminated the mandate to provide "competent" counsel.

Attorney Mallard has appeared as counsel of record in two cases filed in this Court, and continues to act as counsel of record in one of those cases. However, there should be no irrebuttable presumption that any attorney who appears of record in a nonbankruptcy federal case is necessarily competent to act as a litigator. Mallard's affidavit demonstrates that he has appeared due to special circumstances including the facts that (1) the case was taken only because Peter Jenkins, an experienced litigator, had recently become "of counsel" to his firm and was expected to become a partner after he gained admission to the Iowa bar

and the United States District Court for the Southern District of Iowa, (2) the case had to be filed quickly to preserve certain causes of action which were about to run under the statute of limitations, (3) Mallard sought admission to practice before this Court because Mr. Jenkins had not yet been admitted to the Iowa bar, (4) upon the departure of Mr. Jenkins, Mallard has consulted with another attorney who is skilled in litigation, and (5) Mallard has continued as counsel due to ethical obligations to his client.

Mallard submits that he should not be required to represent Plaintiffs in violation of his obligation under Disciplinary Rule 6-101(A)(1) to undertake only those legal representations for which he is competent. There are good policy reasons for such a finding. First, it is unfair

to the client whose rights are dependent upon effective representation. Second, it is unfair to the attorney who may subject himself, unwilling, to malpractice. Finally, to require this representation would inject inefficiency into the judicial system because, in the event there has been ineffective assistance of counsel, the indigent client may be entitled to the appointment of a new attorney and the retrial of his case.

For the reasons stated above, Magistrate Longstaff's ruling denying Attorney Mallard's Motion To Withdraw was an abuse of discretion and should be reversed.

/s/ John E. Mallard
Marcus & Mallard, P.C.
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

MARK ALLEN TRAMAN, et al., Plaintiffs

v.

STEVE PARKIN, et al., Defendants

Civil No. 87-317-B

AFFIDAVIT OF JOHN E. MALLARD
Filed July 29, 1987.

I, John E. Mallard, being first duly sworn, state to the court as follows:

1. I graduated from Vanderbilt Law School in December 1980.

2. I practiced as an attorney at Glenn, Wright, Jacobs and Schell, San Diego, California from May 1981 through April 1983 and I was involved primarily in the representation of creditors in debt collection and bankruptcy proceedings. While I appeared in the Bankruptcy Court for the Southern District of California on numerous

occasions, my representation of clients was limited to (1) complaints for relief from the automatic stay; (2) appearances to investigate assets of debtors; and (3) appearances to respond to proposed plans of reorganization. I also was involved in creditor-debtor proceedings in state courts and as assistant counsel in several actions involving breach of contracts and disputes arising out of contracts. During my association with Glenn, Wright, Jacobs and Schell, I was involved in one deposition relating to the foreclosure of a residence, and one trial in which the sole issue of fact for determination by the court was the value of certain real property that was the subject of a motion for relief from stay.

3. In April, 1983 I left the private practice of law and became in-house counsel to United Investment Groups, Inc., an Iowa corporation which

was involved in the syndication and sale of limited partnership investments. Except as described below, I have not been involved in any litigation since April, 1983.

4. During my employment at United Investment Groups, Inc., I assisted in structuring and preparing private placement memoranda for securities offerings involving research and development limited partnerships.

5. In May 1984 I became associated with the law firm of Jay B. Marcus, P.C. and became a partner in Marcus & Mallard, P.C. on January 1, 1987. During the time of my association with Marcus & Mallard, P.C., my representation of clients has been primarily in the organization and capitalization of businesses. The principal area of my expertise is in the structuring and preparation of documents

for securities offerings and substantially all of my time is spent representing business clients and clients who own or are developing real property.

6. Two of the principal clients of Marcus & Mallard, P.C. have been The Beckley Group and Edward J. Beckley. Based upon our representation of Mr. Beckley, this firm has developed certain familiarity with the personal business dealings of Mr. Beckley.

7. In approximately November, 1986, Mr. Beckley asked this firm to review certain investments he was holding.

8. Upon review of certain of the investments, it appeared that there were certain irregularities in the offering memoranda which had been presented to Mr. Beckley at the time of his investments. This firm agreed to arrange for the filing of complaints with respect to two

investments because (i) the statute of limitations was about to run as to certain causes of action, (ii) Mr. Peter Jenkins had recently become of counsel to this firm and had substantial ligitation experience, and (iii) this firm was very familiar with the circumstances of Mr. Beckley's investments and the securities laws.

9. Prior to this time Marcus & Mallard, P.C. had not handled any litigation other than a couple of debt collection actions in state court. Marcus & Mallard, P.C. only determined to take on the suits for Mr. Beckley (and also two suits for other clients involving breaches of contracts) because Mr. Jenkins had become "of counsel" to this firm. Mr. Jenkins had more than 10 years of litigation experience and it appeared that Mr. Jenkins would become a

partner in Marcus & Mallard, P.C. after he gained admission to the Iowa bar and the United States District Court for the Southern District of Iowa.

10. No member of Marcus & Mallard, P.C. had been admitted to practice before the United States District Court for the Southern District of Iowa at the time the complaints were required to be filed in order to prevent certain statutes of limitations from running. Consequently, this firm arranged for James & Galligan, P.C., Des Moines, Iowa, to file the complaints on behalf of Mr. Beckley. Subsequently, in January 1987, I obtained admission to practice before this court, and in February, 1987, substituted in as counsel for plaintiffs. After my substitution as counsel, Mr. Jenkins decided to leave the private practice of law in Fairfield, Iowa and take a position with a company in Florida.

11. I never intended to become involved in trying the cases which were filed on behalf of Mr. Beckley and certain other plaintiffs (Civil Actions 86-880-A and 86-914-A). In the absence of Mr. Jenkins, I have consulted from time to time with Tom Zurek of Mumford, Schrage and Zurek, P.C., Des Moines, Iowa, in connection with certain aspects relating to these cases, and I have also explored the possibility of Mr. Zurek's substitution as counsel or association as co-counsel. However, due to personal considerations of our client, our client's desire to settle the cases which have been filed, and our ethical obligation to continue to represent our client as long as our skills allow, I have not pursued the association or substitution of Mr. Zurek as counsel for the plaintiffs at this time. Civil Action

86-914-A has been dismissed and the only remaining case in which I am counsel is Civil Action 86-880-A.

12. I have no intention to develop a litigation practice in either the federal or state courts in Iowa and would not have filed the suits on behalf of Mr. Beckley except for the special circumstances set forth at Paragraph 8 above. I do not intend to file additional suits on behalf of other persons except possibly in the areas of debtor-creditor relations and/or bankruptcy proceedings.

13. I have no experience in representing litigants in actions filed under 42 U.S.C. Section 1983 and remember this statute only as a statute which was included in my constitutional law course taken in my first year (1977-1978) of law school. I do not recall the elements of a cause of action brought under this

section and would have to study it thoroughly to become competent. I have no intention to develop a practice representing litigants in actions filed under 42 U.S.C. Section 1983.

14. I do not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity. Because of my reluctance to become involved in these activities, I do not feel confident that I would be effective in litigating a case such as the instant case.

Dated this 28th day of July, 1987.

/s/ John E. Mallard
MARCUS & MALLARD,
P.C.
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

Subscribed and sworn to before me by John E. Mallard this 28th day of July, 1987.

/s/ Notary Public

(5)

No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

Counsel for Petitioner

November 16, 1988

QUESTION PRESENTED

Is a federal court empowered by 28 U.S.C. Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel thereunder?

LIST OF PARTIES

The parties to the proceedings below were the petitioner John E. Mallard and the respondents United States District Court for the Southern District of Iowa, Mark Allen Traman, Michael D. Woods, Jr., Charles O. Reese, Steve Parkin, Robert W. Umthun, Robert Staub, Myron Mason, Mike Booten, Charles Harper, Ronald G. Welder, and Harry Grabowski

TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., RESPONDENTS

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The Court of Appeals for the Eighth Circuit did not write an opinion, and its order is retyped at Pet. App., p. 1a.

The ruling of the United States District Court for the Southern District of Iowa (Vietor, C.J.) has not been

reported. It is retyped at Pet. App., p. 2a. The District Court ruling relies, in part, on an opinion rendered by the District Court in Coburn V. Nix, Civ. No. 86-716-B (S.D. Iowa 1987). The Coburn opinion has not been reported but is retyped at Opp. App., p. 1a.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. Section 1983, plaintiffs brought suit in the case of Mark Allen Traman et al. v. Steve Parkin et al., Civil No. 87-317-B, in the United States District Court for the Southern Distr ct of Iowa. Plaintiffs asked to have a lawyer appointed and, pursuant to 28 U.S.C. Section 1915(d), the petitioner was appointed to represent plaintiffs. On October 27, 1987, the District Court denied the petitioner's motion to dismiss his appointment. On December 7, 1987,

the Eighth Circuit denied the petitioner's application for a writ of mandamus directing the District Court to grant the petitioner's motion to dismiss his appointment. The petition for a writ of certiorari was filed on March 5, 1988 and was granted on October 3, 1988.

The jurisdiction of this Court to reveiw the judgment of the Eighth Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTE INVOLVED

28 U.S.C. Section 1915. Proceedings in forma pauperis

(d) The Court may request an attorney to represent any such person unable to employ counsel and may dismiss the case if the allegation of poverty is untrue, or if satisfied that the action is frivolous or malicious.

STATEMENT OF THE CASE

This is a suit challenging the

authority of the District Court under 28 U.S.C. Section 1915(d) to compel petitioner John E. Mallard, an attorney admitted to practice before said court, to undertake a certain representation. The District Court denied Mallard's motion to dismiss his appointment, holding that Section 1915(d) empowers the court to require an unwilling attorney to serve as counsel. The Court of Appeals for the Eighth Circuit affirmed this ruling by denying Mallard's application for a writ of mandamus.

The Court of Appeals in Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984), directed the District Court to prepare a list of attorneys practicing in the district who would be available for pro bono appointments under Section 1915(d). In response to this directive, the District Court prepared and continues to maintain

a list which includes all attorneys admitted to practice before the District Court and in good standing who have appeared as counsel in a nonbankruptcy federal case in the past five years (Opp. App. 2a-3a). The District Court forwards the list to the Volunteer Lawyers Project, a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association, which assists the District Court in placing civil pro bono assignments (J.A. 14-15). The Volunteer Lawyers Project receives the list, eliminates the names of those attorneys who have signed up with the Volunteer Lawyers Project to provide voluntary service through programs other than the federal referral program (J.A. 15), and then, from the names remaining on the list, selects attorneys for Section 1915(d) appointments. The Volunteer

Lawyers Project is considering a change in its current policy of striking the names of its volunteer attorneys from the list "since the logical extension of this current policy is that all attorneys could sign up for the Volunteer Lawyers Project and no one would be left to accept federal referrals" (J.A. 15).

Petitioner Mallard is a partner in the law firm of Marcus & Mallard, P.C., Fairfield, Iowa, where he practices business law (J.A. 32-33). Mallard sought admission to practice before the District Court as an accommodation to his firm, so that it could appear as counsel of record in certain civil lawsuits which were to be handled by Peter Jenkins, an experienced litigator who had become "of counsel" to the firm (J.A. 34-35). Jenkins had not yet been admitted to the Iowa bar and, accordingly was not yet in a position to

apply for admission to practice before the District Court (J.A. 35).

Petitioner Mallard entered an appearance in the District Court in February, 1987 (J.A. 35) and was contacted by the Volunteer Lawyers Project in June, 1987 to undertake the representation of the plaintiffs in the case of Mark Allen Traman et al. v. Steve Parkin et al., Civil No. 87-317-B, in the United States District Court for the Southern District of Iowa (J.A. 4-5). Mallard never agreed to represent the plaintiffs but did receive their file in order to learn more about the case (J.A. 5). The case involves two indigent inmates of the Iowa State Penitentiary at Fort Madison, Iowa, and one indigent former inmate, who had, collectively, brought an action under 42 U.S.C. Section 1983. The inmates complained that

various prison guards and officials had filed false disciplinary reports against them, mistreated them physically, and endangered their lives by exposing their role as informants.

In June, 1987, Mallard filed a Motion To Withdraw on the grounds that (i) representation of the plaintiffs would involve substantial discovery by deposition and a trial with many parties and witnesses, (ii) counsel for plaintiffs would need to examine and cross-examine numerous parties and witnesses, and (iii) Mallard was not competent to undertake such representation (J.A. 6-8). Mallard was involved primarily in a business and securities law practice, and his courtroom experience was limited to the representation of creditors in debt collection and bankruptcy proceedings during the period from May, 1981 through April, 1983

(J.A. 30-31). During this time, Mallard was involved in one deposition relating to the foreclosure of a residence and one trial in which the sole issue of fact for determination by the court was the value of certain real property (J.A. 31). Mallard's motion to withdraw was submitted to a U.S. Magistrate who denied the motion, thereby ruling that Mallard was competent.

In July 1987, Mallard appealed the Magistrate's denial of the motion to withdraw and also moved to dismiss the appointment on the ground that 28 U.S.C. Section 1915(d) does not empower the District Court to require an unwilling attorney to represent a person making a request for counsel thereunder. In connection with such appeal and motion, Mallard advised the District Court that he did not like "the role of confronting

other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity" (J.A. 38). The District Court affirmed the ruling of the Magistrate finding that "Mallard does have litigation experience. Even without litigation experience Mallard would not necessarily be incompetent. Therefore, Mallard is not incompetent" (Pet.App. 3a).

The District Court also denied Mallard's motion to dismiss the appointment, holding that "Section 1915(d) empowers the court to appoint attorneys to represent indigent civil litigants" (Pet.App. 3a). In the context in which the District Court ruled, its usage of the term "appoint" was synonymous with the term "require" rather than the term "request," which appears in the text of Section 1915(d).

In November, 1987, Mallard sought

appellate review of the District Court's holding with respect to its appointment power under Section 1915(d), by applying to the Court of Appeals for a writ of mandamus directing the District Court to grant Mallard's motion to dismiss his appointment. The Court of Appeals denied Mallard's application for a writ of mandamus, thereby effectively holding that a federal court has authority under Section 1915(d) to compel an unwilling attorney to represent a person making a request for counsel. The Court of Appeals did not write an opinion in support of its judgment (Pet.App. 1a).

SUMMARY OF ARGUMENT

1. The plain meaning of the word "request" as used in 28 U.S.C. Section 1915(d) indicates that Congress intended to authorize the federal courts only to appoint volunteer attorneys. The

"request" language used by Congress in Section 1915(d) when contrasted with the language appearing in other federal statutes authorizing the "appointment" of counsel, further supports a statutory construction to the effect that the federal courts are not empowered by Section 1915(d) to compel an unwilling attorney to undertake a representation. In addition, an analysis of other statutory and constitutional provisions for mandatory appointment of counsel reveal that such provisions are addressed to the protection of compelling legal interests, such as due process rights, whereas Section 1915(d) is directed only to the provision of counsel to a class of persons, i.e. indigent persons, without regard to the importance of any legal interest involved.

2. Section 1915(d) should be construed as authorizing a court only to

"request" an attorney to voluntarily undertake a representation because such a construction is supported by public policy considerations which favor voluntarism rather than mandatory compelled service. Voluntarism should be favored because, among other reasons, voluntary services programs match the specialized skills of the attorney with the particular needs of the client, and provide greater efficiency than mandatory appointment programs.

3. Section 1915(d) must be construed as authorizing a court only to "request" an attorney to voluntarily undertake a representation because any finding of a mandatory appointment power would raise serious doubts regarding the constitutionality of Section 1915(d). A mandatory appointment would infringe an unwilling attorney's freedom of speech

because speech is an integral part of a legal representation, and the government cannot require an attorney to use his speech in a manner that is contrary to the dictates of his conscience, as a condition to admission to practice before the federal courts.

A mandatory appointment would violate an unwilling attorney's right to due process and equal protection of law because the list from which appointments are made has been compiled in an arbitrary manner which creates an under-inclusive subclass of attorneys who must bear the burden of all Section 1915(d) appointments. In addition, attorneys as a class are entitled to protection against the arbitrarily assigned, unequal burden of being required to provide a public benefit at their sole expense.

A mandatory appointment under Section 1915(d), which does not provide

for any compensation, constitutes an unconstitutional taking of property for public use. Courts have formerly held that (i) there is a traditional professional obligation of attorneys to accept uncompensated court appointments and (ii) this obligation prevents attorneys from establishing a "taking." However, a revisionist historical analysis indicates that there is no such widely-shared, traditional obligation which prevents attorneys from asserting their rights under the "takings" clause of the Fifth Amendment.

ARGUMENT

I

THE PLAIN MEANING OF THE WORD "REQUEST" AS USED IN 28 U.S.C. SECTION 1915(d) PREVENTS THE FEDERAL COURT FROM RELYING THEREON TO 'REQUIRE" AN UNWILLING ATTORNEY TO UNDERTAKE A REPRESENTATION

28 U.S.C. Section 1915(d) provides, in relevant part, that "[t]he court may request an attorney to represent any such

person unable to employ counsel." (Emphasis added).

Among the Courts of Appeals which have construed Section 1915(d) in the context of determining the court's authority to require an unwilling attorney to represent an indigent person, the Eighth Circuit stands alone in finding a power to require an unwilling attorney to serve as counsel. The Fifth, Sixth, Seventh, and Ninth Circuits have uniformly held that the federal courts have no power to make a mandatory appointment under Section 1915(d), but can only "request" an attorney to undertake the representation. United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986) ("In our view, 28 U.S.C. Section 1915(d) does not authorize appointment of counsel to involuntary service"); Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982)

("A lawyer should not be conscripted into a Section 1983 case simply because he is a member of the bar, but this does not mean that all members of the bar should be denied the opportunity to assist the cause of justice under the authority of a court appointment"); Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to represent an indigent, not to require him to do so") (emphasis in original); Reid v. Charney, 235 F.2d 47 (6th Cir. 1956) ("The court . . . has the statutory power only to request an attorney to represent a person unable to employ counsel . . . . While the refusal of local counsel to serve was regrettable, the court could hardly do more than was done under the circumstances").

The Ninth Circuit, in the well reasoned opinion of United States v. 30.64 Acres of Land, 795 F.2d 796 (9th Cir. 1986), held that an unwilling attorney cannot be compelled to represent an indigent person under Section 1915(d) based upon the plain meaning of the term "request," especially when the use of tnat term is contrasted with the language used in the Constitution and other federal statutes authorizing appointment of counsel.

> Most persuasively, the plain language of the statute states that a court may "request" counsel for indigents. See 28 U.S.C. Section 1915(d). Statutes that have been construed as authorizing "appointment" of counsel commonly use such words as "appointment" or "assign." See, e.g., 18 U.S.C. Section 3006A(b) (1982) ("the court shall advise the defendant that he has the right to be represented by counsel and that counsel will be appointed to represent him if he is financially unable to obtain counsel"); 25 U.S.C. Section 1912(b) (1982) ("In any case in which the court determines indigency, the parent or Indian custodian shall

> have the right to court-appointed counsel in any removal, placement, or termination proceeding. The court may, in its discretion, appoint counsel for the child upon a finding that such appointment is in the best interest of the child."); 42 U.S.C. Section 1971(f) (1982) ("the court before which [a person charged with contempt under 42 U.S.C. Section 1975d(g)] is cited or tried . . . shall immediately, upon his request, assign to him such counsel, not exceeding two, as he may desire. . . ."); 42 U.S.C. Section 2000e-5(f)(1)(1982) ("Upon application by the complainant [in a Title VII action] and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant. . . ."); see also Fed. R. Crim. P. 44 ("Every defendant who is unable to obtain counsel shall be entitled to have counsel assigned to represent him at every stage of the proceedings. . . .").
>
> . . .
>
> We also note that the constitutional requirements for civil actions differ significantly from those for criminal actions in which courts may appoint counsel. Federal criminal defendants facing imprisonment are entitled to representation of counsel, see, e.g., U.S. Const. amend. VI; Johnson v. Zerbst, 304 U.S. 458, 462, 58 S.Ct. 1019, 1022, 82 L.Ed. 1461 (1938), and the power of courts to appoint counsel for such defendants is thus necessary to

> preserve their constitutional rights. There is normally, however, no constitutional right to counsel in a civil case, see Lassiter v. Department of Social Services, 452 U.S. 18, 25-27, 101 S. Ct. 2153, 2158-60, 68 L.Ed.2d 640 (1981); Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971). But cf. Lassiter, 452 U.S. at 27-32, 101 S.Ct. at 2159-62 (suggesting that due process may in some cases require appointment of counsel for indigent parents in child custody termination proceedings). The failure of a court request actually to secure counsel therefore would not normally prejudice the civil litigant's constitutional rights.

United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986).

Neither the Eighth Circuit nor the District Court below has rendered an opinion discussing the "request" language of Section 1915(d) or considering the likelihood that Congress intended to empower federal courts only (i) to request an attorney to undertake the representation of an indigent and (ii) to appoint an attorney who has voluntarily accepted the request. The Eighth Circuit

has rendered an opinion, however, which indicates that it does not see any need to distinguish the "request" language in Section 1915(d) from the appointment language used in the statutes involving habeas corpus and Title VII civil rights actions. 18 U.S.C. Section 3006A(b); 42 U.S.C. Section 2000e-5(f)(1). The Eighth Circuit has stated as follows:

> The district court ruled that it had no power to appoint counsel to represent an indigent in civil cases. This ruling overlooks the express authority given it in 28 U.S.C. Section 1915 to appoint counsel in civil cases. This court and other courts of appeals regularly make these appointments in habeas corpus and civil rights cases; district courts throughout the country do the same.

Peterson v. Nadler, 452 F.2d 754, 757 (8th Cir. 1971) (footnote omitted; emphasis in original). See Nelson v. Redfield Lithograph Printing, 728 F.2d 1003, 1005 (8th Cir. 1984) (appointing counsel for Title VII case under 28

U.S.C. Section 1915(d) without explaining why 42 U.S.C. Section 2000e-5(f)(1) was not controlling).

As mentioned above, the Eighth Circuit fails to consider the plain meaning of the word "request" and, in particular, the contrast between the use of that word in Section 1915(d) and the use of the word "appoint" in other federal statutes (pp. 18-19, supra). It is clear that Congress and the drafters of the Constitution have singled out certain rights which are so highly regarded that legal representation must be made available, and a mandatory appointment of counsel or other provision for counsel is justified.[1] With this understanding in mind, it is also clear that Congress, in using the plain

[1] Certain rights, such as the right under the Sixth Amendment to the assistance of counsel in the defense of

language that a court may "request" counsel for indigents, never intended to provide indigents or indigent holders of Section 1983 claims with an extraordinary assurance of access to legal representation.

Such a manner of statutory construction accords due respect to the rights of Congress, as contrasted with the rights of the courts, to determine those instances (not involving any right to counsel based upon constitutional provisions assuring due process of law) which justify mandatory appointment of

[1] (continued from prior page) criminal prosecutions, are undoubtedly based upon a compelling interest of the defendant to have access to counsel. In those instances where the defendant is indigent and unable to retain counsel, our government also has a compelling interest in providing counsel as a key ingredient of our system of justice. In such instances, a mandatory appointment of counsel is justified provided that the mandatory appointment does not infringe any constitutionally protected right of the attorney who is appointed. See Section III below.

counsel. While both the courts and Congress are involved in the regulation of attorneys, it appears that Congress is the appropriate body to regulate the practise of law for the purpose of effecting a distribution or redistribution of legal services in society.

While Congress has enacted Section 1915(d) as a means of encouraging cooperation between the bench and the bar in facilitating the representation of indigent persons, Congress has not provided for mandatory appointment of attorneys to serve indigent persons. Consequently, an attorney may refuse a request to undertake a certain representation under Section 1915(d).

II

SOUND PUBLIC POLICY CONSIDERATIONS SUPPORT THE ESTABLISHMENT OF A VOLUNTARY ATTORNEY APPOINTMENT PROGRAM UNDER 28 U.S.C. SECTION 1915(d) AND THESE POLICY CONSIDERATIONS SHOULD NOT BE FRUSTRATED BY EFFORTS TO COMPEL "VOLUNTARISM"

The Eighth Circuit supports its holding that attorneys may be compelled to accept an "appointment" made under 28 U.S.C. Section 1915(d), by referring to the professional duty of the bar to provide public service. See Peterson v. Nadler, 452 F.2d 754, 758 (8th Cir. 1971).

It is clear that attorneys have committed themselves to make legal counsel available and to aspire to assist persons who do not have the financial ability to employ counsel. The Iowa Code of Professional Responsibility for Lawyers states:

> Financial Ability to Employ Counsel: Persons Unable to Pay Reasonable Fees
>
> EC 2-26. A layman whose financial ability is not sufficient to permit payment of any fee cannot obtain legal services, other than in cases where a contingent fee is appropriate, unless the services are provided for him. Even a person of moderate means may be unable to pay

a reasonable fee which is large because of the complexity, novelty, or difficulty of the problem or similar factors.

EC 2-27. Historically, the need for legal services of those unable to pay reasonable fees has been met in part by lawyers who donated their services or accepted court appointments on behalf of such individuals. The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer, and personal involvement in the problems of the disadvantaged can be one of the most rewarding experiences in the life of a lawyer. Every lawyer, regardless of professional experience or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, but the efforts of individual lawyers are often not enough to meet the need. Thus it has been necessary for the profession to institute additional programs to provide legal services. Accordingly, legal aid offices, lawyer referral services, and other related programs have been developed, by the profession. Every lawyer should support all proper efforts to meet this need for legal services.

That lawyers should perform pro bono services is not in dispute. The issue

here is whether lawyers will continue to enjoy their traditional freedom to choose the circumstances under which they perform such public service.

There are good reasons for allowing an attorney to choose the public service he will provide rather than allowing a court to dictate the services which must be performed.

First, only a system which accords an attorney the right to choose his service is truly voluntary. By definition, voluntarism involves services given freely and without compulsion.

Voluntarism is highly valued and respected in American society. Because volunteers give freely of their time, and involve themselves in causes which interest them, volunteers act with conviction. In many instances, volunteers also possess or develop special

knowledge or experience relating to the subjects of their interest. The combination of conviction and skill in action ensures that voluntary services are not only rewarding to the volunteer but also valuable to the beneficiaries of the voluntary services.

Because voluntarism is based upon freedom of choice, voluntarism reinforces and fortifies the volunteer's freedom of speech, whereas compulsion to act interferes with such liberty (see Section III(A) pp. 37-45 infra).

In the interest of promoting volunteerism as a public policy, an attorney should not be compelled to undertake the cause of a particular indigent person if the attorney has greater interest in other causes. An attorney's preferences of association with certain causes should be respected. Otherwise, compelling an attorney to

"volunteer" his services for a particular cause would transform pro bono work from an activity based upon the "giving" of services to an activity with certain indicia of involuntary servitude.

A second public policy consideration in favor of a holding that Section 1915(d) confers only a voluntary appointment power is the policy of designing programs to ensure maximum efficiency. An attorney may have expertise in one area of law but not in another. There would be little efficiency if a bankruptcy expert were assigned to try a case under 42 U.S.C. Section 1983.

As compared with a program based upon mandatory appointments, a voluntary program provides greater assurance that attorneys will be matched with clients to whom they can render competent and

effective service. A court which proposes to make a mandatory appointment of counsel may be well acquainted with the legal needs of the indigent person but the court cannot know the legal skills of the attorney that it proposes to appoint as well as the attorney knows his or her own skills. In this regard, it is significant to note that the mandatory Section 1915(d) appointment program administered by the Volunteer Lawyers Project on behalf of the District Court does not even attempt to match specialized legal skills with particular legal needs, but rather selects attorneys for appointment based upon a lottery system.

At a minimum, the volunteer attorney should be competent. Iowa Code of Professional Responsibility for Lawyers, Disciplinary Rule 6-101(A)(1) provides that: "A lawyer shall not handle a legal matter which he knows or should know that

he is not competent to handle, without associating with him a lawyer who is competent to handle it." Consequently, a lawyer should not be compelled to undertake a particular legal representation if he does not feel competent to handle it.

In the instant case, Mallard resisted his appointment to serve as counsel for plaintiffs on the ground that he had little litigation experience and no litigation experience in cases of this kind, rendering him incompetent to undertake the representation. In lieu of representing the plaintiffs, Mallard volunteered to perform other service which he felt competent to provide, such as debt counseling or bankruptcy, but the Volunteer Lawyers Project and District Court refused Mallard's offer.

When Mallard moved to withdraw from the appointment, the District Court

denied his motion. While the District Court held that Mallard was competent, it is clear from Mallard's general lack of litigation experience that his skills would fall at the low end of the range of skills possessed by all members of the federal bar who were eligible for referrals under Section 1915(d).

The mandatory appointment system in effect in the District Court is inefficient by reason of its failure to acknowledge specialized legal skills and allocate them accordingly. As a consequence of this inefficiency, the plaintiffs in the underlying case might not receive effective assistance of counsel and the petitioner might be subjected to suit for malpractice. Ferri v. Ackerman, 444 U.S. 193 (1979).

In conclusion, sound public policy considerations arising out of respect for voluntarism and concern for efficient and

competent representation of indigent persons support a finding that Section 1915(d) is best construed as providing for voluntary attorney appointments.

III

28 U.S.C. SECTION 1915(d) MUST BE CONSTRUED TO PROVIDE FOR VOLUNTARY ATTORNEY APPOINTMENTS BECAUSE ANY FINDING OF MANDATORY APPOINTMENT POWER AND EXERCISE OF SUCH POWER TO COMPEL AN UNWILLING ATTORNEY TO SERVE AS COUNSEL WOULD INFRINGE CERTAIN CONSTITUTIONALLY PROTECTED RIGHTS OF THE ATTORNEY AND RAISE SERIOUS DOUBTS REGARDING THE CONSTITUTIONALITY OF SECTION 1915(d).

Mandatory appointment under Section 1915(d) causes an infringement of an unwilling attorney's constitutionally protected rights and raises serious doubts regarding the constitutionality of Section 1915(d). See Sections III(A) through (C), pp. 37-62 infra. "When the validity of an act of Congress is drawn in question, . . . it is a cardinal principle that this Court will first ascertain whether a construction of the

statute is fairly possible by which the question may be avoided." Ashwander v. Valley Authority, 297 U.S. 288, 348 (1936) (Brandeis, J. concurring). See National Labor Relations Board v. Catholic Bishop of Chicago, 440 U.S. 490, 500 (1978); Machinists v. Street, 367 U.S. 740, 749 (1961). The elimination of any element of compulsion under Section 1915(d), through a finding that such law empowers the federal court only to "request" an attorney to undertake a representation which the attorney may refuse, would ensure the constitutionality of Section 1915(d).

The argument that Section 1915(d) must be construed to avoid serious doubts regarding its constitutionality was not presented to the Eighth Circuit or the District Court below or described in the Petition for Certiorari to this Court.

However, the statement of the question presented in the Petition for Certiorari is "deemed to comprise every subsidiary question fairly included therein." Supreme Court Rule 21.1(a). The new argument is clearly relevant to the resolution of the question presented, i.e. whether Section 1915(d) can be fairly construed as empowering a federal court to require an unwilling attorney to undertake a certain representation. Consequently, the arguments made in this Section III are "fairly included" in this brief. Dewey v. Des Moines, 173 U.S. 193, 198 (1898) ("Parties are not confined here to the same arguments which were advanced in the courts below upon a Federal question there discussed"); Illinois v. Gates, 462 U.S. 213, 248 (1983) (White, J. concurring) (citing Dewey and stating "We have never suggested that the jurisdictional stipu-

lations of Section 1257 require that all arguments on behalf of, let alone in opposition to, a federal claim be raised and decided below").

Even when an issue (as distinguished from an argument supporting an issue) has not been presented to the courts below or discussed in the petition for certiorari, this Court has reserved the power to address the new issue in appropriate circumstances. Vance v. Terrazas, 444 U.S. 252, 258-59 n.5 (1980). Cases presenting "appropriate circumstances" have generally involved one or more of the following factors: (i) origination in federal court as distinguished from state court; (ii) interpretation of federal law as distinguished from state law; (iii) presence of sufficient facts in the record to allow for a fair and intelligent decision on the new issue; (iv)

opportunity for opposing parties to present briefs on the new issue; and (v) relevance of the new issue to an intelligent resolution of the case. See generally R. Stern & E. Gressman, Supreme Court Practice, Sections 3.24, 6.25, and 6.26 (6th Ed. 1986). All of the foregoing factors are present in the instant case. Consequently, not only are the new arguments presented herein "fairly included" in support of the question presented in the Petition for Certiorari, but "appropriate circumstances" also exist for a full and fair consideration of these new arguments.

A. Compelling an Attorney To Undertake a Certain Representation Violates the Attorney's Freedom of Speech

The Respondent District Court appointed Petitioner Mallard to represent the plaintiffs in the case of Mark Allen Traman et al. v. Steve Parkin et al.,

Civil No. 87-317-B, and, in response to Mallard's motion to dismiss the appointment, held that 28 U.S.C. Section 1915(d) empowers the District Court to compel Mallard to undertake such representation, presumably under penalty of forfeiture and cancellation of Mallard's admission to practice before the District Court. But the government cannot condition a benefit, such as admission to practice before the federal courts, on the relinquishment of a constitutional right. Bates v. State Bar of Arizona, 433 U.S. 350 (1977) (holding that admission to state bar may not be conditioned upon the surrender of a First Amendment right to advertise services and fees); Baird v. State Bar of Arizona, 401 U.S. 1 (1970) (holding that admission to state bar may not be conditioned upon an individual's views, beliefs, or associations); Sherbert v. Verner, 374 U.S. 398

(1963) (holding that unemployment compensation cannot be conditioned on an infringement of free exercise of religion).

The District Court seeks to compel Mallard to represent the plaintiffs in the underlying action as a condition to maintaining his admission to practice before the District Court. But this compelled representation of plaintiffs is an unconstitutional condition because it violates Mallard's First Amendment right to be free in his choices and expressions of speech.

The services of an attorney are centered around the use of speech and it is no coincidence that attorneys commonly refer to their service of clients as "representation." If Mallard is compelled to represent the plaintiffs, there can be no question but that he must

formulate ideas and exert his speech.

The record in this case demonstrates tha Mallard (i) believes he is not competent to represent the plaintiffs and (ii) does not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity. In light of these views and beliefs, Mallard cannot be compelled to represent the plaintiffs because such representation necessarily requires the exercise of his speech (i) against his will (in light of his belief that he is not competent to undertake the representation) and (ii) in a manner that is contrary to his good conscience (in light of his dislike for confrontational and accusatory speech). Elfbrandt v. Russell, 384 U.S. 11 (1966).

In Elfbrandt, this Court held that a state employee could not be required to take a loyalty oath, because the oath

included a statement swearing to "defend" the state against enemies, and the petitioner could not in good conscience affirm that statement. Since the holding in Elfbrandt protects individuals against any requirement to recite an oath, it must also protect Mallard against any requirement to speak against his conscience or to formulate the ideas and statements which comprise the objectionable "oath."

In Bates v. State Bar of Arizona, 433 U.S. 340 (1977), this Court held that the First Amendment prohibits the government from conditioning admission to the bar upon an infringement of an attorney's right to engage in commercial forms of speech. Since commercial forms of speech are generally accorded less protection then ideational forms of speech, it follows from the holding in

Bates that admission to practice before the federal bar cannot be conditioned on an infringement of ideational forms of speech, as in the instant case.

In Baird v. State of Arizona, 401 U.S. 1, 7-8 (1971), this Court held (i) that "the practice of law is not a matter of grace, but of right for one who is qualified by his learning and his moral character" and (ii) that an individual's views, beliefs, and associations are protected from judgmental findings by the state. To give effect to these holdings, this Court also held that the state cannot inquire about such views, beliefs or associations "to lay a foundation for barring an applicant from the practice of law." When this reasoning is applied to the instant case it follows that (a) Mallard's views and beliefs must be respected and (b) Mallard's expressions of speech (or non-speech) based upon his

views and beliefs are protected from judgmental findings by the government. Consequently, the District Court cannot compel Mallard to undertake the representation of plaintiffs and engage in certain speech, under penalty of forfeiture and termination of his admission to the federal bar.

The foregoing analysis demonstrates that a mandatory appointment power under Section 1915(d), as applied to the appointment of Mallard, would infringe Mallard's freedom of speech. However, before any judgment can be rendered as to whether this infringement is unconstitutional, this Court must consider whether there is any compelling governmental interest which justifies the interference with Mallard's First Amendment rights. As noted above (Section I, pp. 22-23 supra), there is no compelling

governmental interest in providing counsel under Section 1915(d) to indigents in civil lawsuits. But cf. U.S. Const. amend. VI (providing a right to counsel in criminal prosecutions). Even if this Court were to find a compelling governmental interest in providing counsel to indigents (or indigent inmates holding Section 1983 claims, such as the plaintiffs in the underlying action), the government would still not be able to justify the interference with Mallard's First Amendment rights because "less restrictive alternatives" are available. Counsel might be provided to indigent persons by governmental agencies, legal services corporations, or members of the private bar who have no objection to providing the type of representation that is sought.

In conclusion, a finding of mandatory appointment power under Section

1915(d) and exercise of that power to require Mallard to act as counsel to the plaintiffs herein would infringe Mallard's freedom of speech and raise serious doubts regarding the constitutionality of Section 1915(d). To avoid a judgment on the validity of Section 1915(d), this Court should construe said statute as authorizing only voluntary attorney appointments.

B. Compelling a Subclass of All Qualified Attorneys To Assume the Burden of Section 1915(d) Appointments Denies Due Process and Equal Protection of Law To the Attorneys Within the Subclass

In compiling a list of the names of attorneys practising in the United States District Court for the Southern District of Iowa who would be available for appointments under 28 U.S.C. Section 1915(d), the District Court and the Volunteer Lawyers Project have determined

to eliminate from the list the names of those attorneys who (i) have not appeared as counsel in a nonbankruptcy federal case in the past five years or (ii) have signed up with the Volunteer Lawyers Project to provide voluntary service through programs other than the federal Section 1915(d) referral program.

The effect of the decisions to eliminate the names of certain attorneys is to create a subclass of attorneys who are required to bear the burden of all Section 1915(d) appointments. Since the purpose of Section 1915(d) is to achieve a positive public good, one would ordinarily expect the courts to administer the program so that Section 1915(d) appointments are shared by all qualified members of the federal bar of that district, especially when the District Court construes appointment made under Section 1915(d) to be mandatory.

The list of attorneys used for making Section 1915(d) appointments is "under-inclusive" when considered from the standpoint of all qualified attorneys admitted to practice at the federal bar of the district. First, the list excludes all persons who are involved exclusively in a bankruptcy practice, even though the District Court, in ruling on Mallard's motion to withdraw on grounds of incompetency (i) found Mallard to be competent based upon his past litigation experience in bankruptcy and state court debt collection matters and (ii) reasoned that an attorney would not necessarily be incompetent even if he had no litigation experience. Based upon this standard for competence, it is clear that there are many attorneys, especially those with bankruptcy practices who have been involved in numerous adversary pro-

ceedings in bankruptcy, who are qualified for Section 1915(d) assignments but have not been included on the list.

Second, the list excludes the names of all attorneys who have signed up with the Volunteer Lawyers Project to provide other forms of public service. This exclusion has created such concern for an exodus of qualified attorneys that the Volunteer Lawyers Project has considered ending the exclusion "since the logical extension of this current policy is that all attorneys could sign up for the Volunteer Lawyers Project and no one would be left to accept federal referrals" (J.A. 15).

The Fifth amendment guarantees due process of law and the concept of due process includes within it the concept of equal protection. See Bolling v. Sharpe, 347 U.S. 497 (1954). The equal protection doctrine does not prevent

classification but "the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). This rational basis test applies unless the denial of equal protection relates to a fundamental right or a suspect class, in which case a strict scrutiny test or sliding scale test is applied to determine whether the unequal treatment is justified.

The ability to practice law is not a fundamental right and attorneys are not a suspect class, but the subclass of attorneys listed by the District Court and Volunteer Lawyers Project is a suspect class based upon its non-

participation in the Volunteer Lawyers Project. The Volunteer Lawyers Project has effectively determined that attorneys who provide voluntary services through it will be given credit for such service and will be exempted from being compelled to serve under Section 1915(d), but attorneys who choose to provide voluntary service on their own or through some other agency do not receive any similar credit. Because the Volunteer Lawyers Project has clearly discriminated in favor of its own volunteers, the non-affiliated attorneys become a suspect class.

The unequal burden on Mallard and other similarly situated attorneys clearly fails the strict scrutiny test because the District Court, in administering appointments under Section 1915(d), could easily take steps to correct the under-inclusive

classification. For the same reason, the under-inclusive classification is arbitrary and fails the rational basis test. Even though there exists some relation between the means of mandatory court appointments and the end of providing a public benefit in the form of increased representation to indigent persons, this relationship becomes rational only when the court appointments are directed to all persons who are similarly circumstanced. Royster, 253 U.S. at 415.

The equal protection analysis also applies to protect attorneys as a class from being burdened with delivering a public benefit at their sole expense since there is no provision for compensation under Section 1915(d)[2]. The Cali-

2 This statement assumes that attorneys incur "expense" when they are required to perform services for no

fornia Supreme Court has reasoned as follows: "[t]o charge the cost of operation of state functions conducted for public benefit to one class of society is arbitrary and violates the basic constitutional guarantee of equal protection of law". In re Jerald C., 36 Cal.3d 1, 6 (1984). See Cunningham v. Superior Court, 176 Cal.App.3d 349, 362 (1986) (citing the quoted passage from Jerald and holding that attorneys as a class are denied equal protection of law when they are required to represent indigents without compensation).

Based upon the foregoing equal protection analysis, this Court must avoid construing Section 1915(d) as

---

2 (continued from prior page) compensation. It has been argued that there is no expense involved because attorneys have a professional obligation to perform such services. This argument is considered and rejected at Section III(C), pp. 54-62 infra.

authorizing mandatory appointments of attorneys because such a construction would raise serious doubts regarding the constitutionality of Section 1915(d). In addition, since the purpose of the foregoing equal protection analysis is to consider its impact on statutory construction, it should be noted that this Court need not engage in a rigorous exercise to determine whether there might be justifying rationales for the unequal treatment of Mallard and other similarly situated attorneys. Section 1915(d) should be construed as more appropriately contemplating a voluntary appointment power rather than a mandatory appointment power in light of important public policy considerations which favor (i) treating all similarly circumstanced attorneys in an equal manner and (ii) requiring that the cost of public programs be borne by

all members of society.

C. Compelling an Attorney To Undertake a Representation Without Compensation Constitutes an Unconstitutional Taking of Property

There is no provision for compensation to attorneys representing indigents under 28 U.S.C. Section 1915(d).[3] This lack of compensation, when coupled with the mandatory appointment power, creates serious doubt as to the constitutionality of Section 1915(d) under the "takings" clause of the Fifth Amendment.

Before undertaking a rigorous analysis of the "takings" clause in the context of this case, it should be noted

3 The underlying case involves claims by plaintiffs under 42 U.S.C. Section 1983. 42 U.S.C. Section 1988 provides for the recovery of fees in successful Section 1983 cases. However, there can be no assurance that the plaintiffs will prevail or that Petitioner Mallard, if compelled to serve, would ultimately receive any compensation.

that the failure to provide for compensation presents non-constitutional grounds for construing Section 1915(d) as authorizing only voluntary appointments. After comparing the language of Section 1915(d) with the language of other federal statutes providing for appointment of counsel, the Court of Appeals for the Ninth Circuit reasoned as follows:

> [I]f a statute intends appointment of counsel, it often makes provision for paying such counsel. See, e.g., 18 U.S.C. Section 3006A(d); 25 U.S.C. Section 1912(b) (1982). No statute provides funds to pay counsel secured under 28 U.S.C. Section 1915(d).

United States v. 30.64 Acres of Land, 795 F.2d 796, 801 (9th Cir. 1986). Because Congress has often made provision for the payment of appointed counsel, the Ninth Circuit reasons that, in general, Congress does not intend to impose a mandatory appointment obligation upon an

attorney in those instances involving statutes, such as 28 U.S.C. Section 1915(d), which do not provide for compensation. In addition to the use of this comparative statutory analysis, public policy considerations which weigh against involuntary servitude and in favor of "life, liberty, and the pursuit of happiness," support a presumption in the face of statutory ambiguity that any performance of public service should be justly compensated.

Private property may not be taken for public use, without just compensation. U.S. Const. amend. V. Any services rendered by an attorney who has received a mandatory public appointment under Section 1915(d) benefit the public because they follow and support the determination of Congress to make legal representation available to indigent

persons. An attorney's services constitute "private property" within the meaning of the Fifth Amendment. See Schware v. Board of Bar Examiners, 353 U.S. 232 (1957); Konigsberg v. State Bar, 353 U.S. 252 (1957). See generally Stevens, Forcing Attorneys to Represent Indigent Civil Litigants: The Problems and Some Proposals, 18:3 J.L.Ref. 767, 782-783 (1985).

In view of the above, a mandatory appointment under Section 1915(d) violates the Fifth Amendment if there is a "taking." Courts have formerly reasoned that there is no "taking" because attorneys are officers of the court and are already obliged by the traditions of the profession to render public service upon appointment by a court. United States v. Dillon, 346 F.2d 633 (9th Cir. 1965); Tyler v. Lark, 472 F.2d 1077 (8th Cir.), cert. denied sub nom. Beilenson v.

Treasurer of U.S., 414 U.S. 864 (1973). But these opinions rely upon faulty historical analysis and give undue weight to this Court's statement in Powell v. Alabama, 287 U.S. 45, 73 (1932) that: "[a]ttorneys are officers of the court, and are bound to render service when required by such an appointment." The statement in Powell was dicta, and the Court's conclusion that attorneys owe an obligation based upon their role as officers of the court was based on the treatise of Thomas Cooley, a British rather than American legal authority.

In 1980, Harvard law professor David Shapiro undertook an historical analysis of the authority of the British and American courts to compel an unwilling private attorney to represent an indigent and concluded as follows:

> To justify coerced, uncompensated legal services on the basis of a

> firm tradition in England and the United States is to read into that tradition a story that is not there. The occasions on which lawyers have given their time and abilities at little or not cost--either on their own initiative or at a court's request--are surely beyond counting. And the sense that doing so is a fulfillment of a high professional aspiration has often been expressed. [Fn. omitted.] But the notion that an unwilling lawyer could be forced to serve without fee, though not without its advocates over the centuries, seems never to have found universal acceptance. At least before the latter part of the nineteenth century, that notion is even harder to document in particular instances than it is to support with general pronouncements like Chief Justice Hale's and Thomas Cooley's. (Shapiro, The Enigma of the Lawyer's Duty To Serve, (1980) 55 N.Y.U.L. Rev. 735 at page 753).

The precedents cited in Dillon and other cases that seemingly support a court's power to conscript an unwilling attorney on the notion that an attorney is an "officer of the court," are based upon a misunderstanding of the structure of the British court system.

> "The role of the English 'attorney' has no counterpart in this country.

> Unlike barristers [the counterpart of American lawyers], attorneys 'were admitted directly by the judges of the court' and medieval statutes gave the court direct control over these officers. [citation]. The role of the attorney, as an officer of the court, resembled the role performed by staff members in the court engaged in ministerial duties. [citation]" (State ex rel. Scott v. Roper, 688 S.W.2d 757, 765 (Mo. 1985).

In a recent consideration of the authority of a court to compel an unwilling private attorney to serve without just compensation, the Kansas Supreme Court relied upon Professor Shapiro's historical analysis and summarized its conclusions as follows:

> In 55 N.Y.U. L. Rev. at 756, it is found that 35 American jurisdictions had addressed the question of whether free indigent defense services is an enforceable duty upon the private bar. In a bare majority, eighteen jurisdictions, the law imposed an unqualified enforceable duty. Many of the cases cited, attributed to the eighteen majority jurisdictions, predate the turn of the century. One state, Alaska, has since overruled its former "majority" case, Jackson v. State, 413 P.2d 488 (Alaska 1966), and now holds that a private attorney cannot be compelled to represent indigent criminal defendants without just compensation. De Lisio v. Alaska Superior Court, 740 P.2d 437 (Alaska 1987). The pendulum has swung, and the "bare majority" now holds that free indigent defense services is not an enforceable duty of the private bar. (State ex rel. Stephan v. Smith, 242 Kan. 336, 359; 747 P.2d 816, 835 (1987)).

Based upon the foregoing revisionist history, this Court should reject the reasoning in Dillon that a lawyer, as an officer of the court, has consented to and assumed an obligation to accept appointments without compensation. United States v. Dillon, 346 F.2d 633, 635 (9th Cir. 1965). Lawyers have no such traditional obligation and such concept is nowhere clearly understood or expressed so as to make it fair to assume that lawyers have waived the express protections of the "takings" clause of the Fifth Amendment.

In conclusion, compelling a lawyer to render services without compensation constitutes a taking of his private property in contravention of the Fifth Amendment. Therefore, Section 1915(d) must be construed as authorizing only a voluntary appointment power because such a construction avoids serious questions regarding the constitutionality of Section 1915(d).

CONCLUSION

For these various reasons, 28 U.S.C. Section 1915(d) should not be construed as empowering the District Court to require Mallard to undertake the representation of the plaintiffs in the case of Mark Allen Traman, et al. v. Steve Parkin, et al. The judgment of the Court of Appeals should be reversed and a writ of mandamus should be issued directing the District Court to grant the

petitioner's motion to dismiss his appointment.

Respectfully submitted,

John E. Mallard
107 South Main
Fairfield, Iowa 52556
Counsel for Petitioner

[redacted]

FILED
DEC 30 [redacted]
[redacted]
CLERK

In the

[redacted] Court of the United States

[redacted] Term, [redacted]

JOHN E. MALLARD,

Petitioner,

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al.,

Respondent.

[redacted] Petition For A Writ Of Certiorari To The United States
Court Of Appeals For The Eighth Circuit

BRIEF FOR THE RESPONDENT
UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF IOWA

Thomas J. Miller
Attorney General of Iowa

Gordon E. Allen*
Deputy Iowa Attorney General
1300 East Walnut
Des Moines, IA 50319

Susan St. Clair
Assistant Attorney General
1300 East Walnut
Des Moines, IA 50319
(515) 281-5164

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

96 PP

COUNTER-STATEMENT OF QUESTION PRESENTED

Is 28 U.S.C. Section 1915(d) consistent with the power of a federal district court to require an unwilling attorney to represent a person making a request for counsel thereunder?

TABLE OF CONTENTS

TABLE OF CONTENTS (Cont.)

TABLE OF AUTHORITIES

Pages

CASES

TABLE OF AUTHORITIES–Continued

Pages

TABLE OF AUTHORITIES–Continued

TABLE OF AUTHORITIES–Continued

STATUTES

RULES

ARTICLES

TABLE OF AUTHORITIES–Continued

TABLE OF AUTHORITIES–Continued

STATEMENT OF THE CASE

The Eighth Circuit Court of Appeals in *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984), writing in its "general supervisory authority involving district courts," directed the chief judge of each district "to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations . . . ". In so ruling, the *Nelson* Court noted that it had "in the past acknowledged the express authority of the district court to make such appointments." *Nelson* at 1004. *See also Hahn v. McLey*, 737 F.2d 771 (8th Cir. 1984).

To implement the *Nelson* mandate, the Clerk of Court for the Southern District of Iowa, acting in cooperation with the Federal Practice Committee of the Iowa State Bar Association, began in 1984 to employ a list of active federal court practioners to receive *Nelson* appointments. (*See Coburn* Order, 6/16/87, Brief Opp. Cert., App. 1a.) The list, which had been compiled in 1982, consisted of attorneys who were counsel of record in five or more civil cases or two or more criminal cases in the preceding year.

Within about a year and a half it became clear that the list, which included only about 4% of federal court practitioners, was too short and that unless the pool of attorneys were expanded, a relatively small group of attorneys would be unfairly burdened.

A new system was initiated in February of 1986. The plan for the appointment process is reproduced as Appendix I to this Brief. Under the new system, once the

Court had ordered that counsel be appointed to represent an indigent in a civil case, the Clerk would forward a copy of the court file to the Volunteer Lawyers Project ("the Project"), a joint venture of the Legal Services Corporation of Iowa and the Iowa State Bar Association. The Project had been provided a roster of all attorneys licensed to practice and in good standing in the district, and used this roster in arranging for representation pursuant to the court order. However, the Project would pass over any attorney already participating in the representation of indigents on a *pro bono* basis through the Project's own referral system of cases screened through legal aid offices.

An attorney staff member of the Project, proceeding systematically through the list but making allowances for geographical convenience, would telephone an attorney and ask whether he or she had been of record in federal court (other than in bankruptcy court) within the previous five years. If so, the attorney was eligible to receive an assignment and the Project staff lawyer would describe the case and identify the parties.

If the contacted attorney protested that he or she was then too busy to take the case, a grace period of weeks or even months would be arranged to allow that attorney an opportunity to make room for a *pro bono* assignment in his or her caseload. If the contacted attorney expressed concerns about a lack of familiarity with the area of the law in question, the Project lawyer would explain the resource materials and other support available to assist assigned counsel. If no obstacle to the assignment appeared, a copy of the court file was sent to the newly-appointed counsel, and a notice of the assignment was

filed with the Court. At this point, the Project would also provide appointed counsel with legal resource materials relating to the case in question, as well as a description of how out-of-pocket costs of representation could be reimbursed by the court.

Through this process, John Mallard was contacted by the Project to represent the indigent plaintiffs in *Mark Allen Traman et al. v. Steve Parkin et al.*, Civil No. 87-317-B (U.S. District Court, S.D. Iowa), in June of 1987. (J.App. 4.) After receiving the court file in the case, Mallard filed a Motion to Withdraw. The Magistrate denied Mallard's motion to withdraw and ruled Mallard was competent. (Pet. App. 3a). Mallard sought the District Court's review of that finding, and asserted as an additional excuse for not serving that he "did not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity." (J.App. 38).

The District Court affirmed the Magistrate's decision, and expressly ruled that "Section 1915(d) empowers the court to appoint attorneys to represent indigent civil litigants." (Pet. App. 3a).[1] Mallard then sought a writ of mandamus from the Eighth Circuit Court of Appeals to

---

[1] Although not asserted by the District Court, its local practice can be affirmed as an exercise of authority granted by Rule 83 of the Federal Rules of Civil Procedure and 28 U.S.C. 2071, as discussed in Brief Point II by Amicus Bar of the City of New York. The Eighth Circuit did not address the validity of this local practice in its order but this separate and independent ground must be considered on review of this certiorari to a mandamus request. See n. 2.

compel the District Court to grant his motion to withdraw the appointment. The Circuit Court, without opinion, denied the application for the writ. Certiorari was granted on October 3, 1988, to review the denial of mandamus.[2]

SUMMARY OF ARGUMENT

28 U.S.C. § 1915(d) is ambiguous. Statutes are not to be construed in any way which renders language superfluous. To give the statutory language meaningful effect, it must be understood to grant courts more than the power to plead with lawyers for their cooperative support. The historical context and contemporary language usage supports the interpretation that Congress intended to grant the Federal court a power which eleven states had at that time granted their own courts. The American statute appears to be a modernization of the English law without an attempt to alter the basic approach. That

[2] In *Gulfstream Aerospace Corp. v. Mayacamus Corp.*, 485 U.S. ___, 99 L.Ed.2d 296, 313 (1988), this Court reaffirmed the limited nature of mandamus. Limited to "exceptional circumstances" the writ may issue when there is a "judicial usurpation of power." *Allied Chemical Corp. v. Daiflon, Inc.*, 449 U.S. 33, 34 (1980); *Will v. United States*, 389 U.S. 90 (1967). The party seeking mandamus has the "burden of showing that its right to issuance is clear and indisputable." *Bankers Life and Casualty v. Holland*, 346 U.S. 379 (1953).

Petitioner did not demonstrate to the Eighth Circuit that the District Court of Iowa exceeded its authority, clearly and indisputably. The order of the Eighth Circuit Court of Appeals may be affirmed if the District Court had the authority from whatever source to appoint Petitioner, even if it relied on an incorrect reason. *Helvering v. Gowran*, 302 U.S. 238 (1937).

approach is consistent with a long tradition of professional obligation to the administration of justice.

28 U.S.C. § 1915(d) is consistent with and in recognition of the inherent power of the court to regulate the conduct of attorneys before it, and to provide for meaningful assistance by attorneys and others in the administration of justice. Additionally, the local policy of the District Court of Iowa is consistent with the powers granted to local district courts by Federal Rule of Civil Procedure 83, and 28 U.S.C. § 2071.

Sound public policy considerations support the reasonableness of the interpretation that the 1892 statute was consistent with the essential role of attorneys in partnership with the courts in the administration of justice. Congress could have reasonably believed that providing courts with the discretionary power to direct counsel to represent indigents would foster meaningful access to the courts. Additionally, involvement of counsel prevents the waste of valuable judicial time, by sharpening the issues, shaping the examination of witnesses, shortening the trial, and assisting in a just determination.

Lawyers have de facto control over the distribution of a fundamental and valuable resource, namely access to society's tribunals. With the license to dispense this resource for a fee comes certain duties, including the duty to see that the poor and unpopular are not excluded. In granting lawyers the exclusive right to advise on the law and advocate in the courts, lawyers are placed in a unique role, with roots deep in the Constitution.

The constitutional arguments Petitioner raises for the first time in his brief are insufficiently supported in the

record to allow for a fair and fully informed decision. The Fifth Amendment does not require that the government pay for the performance of a public duty it is already owed. Petitioner knew in advance that some measure of public claim would be made upon his skilled services. Any expectation to the contrary is unreasonable and the services are to that extent not private property. There is no "taking".

As an exercise of section 1915(d) discretion, or of inherent power, under the circumstances demonstrated in this record, there is no abuse of discretion by the Federal District Court for Iowa. Mandamus will not lie where the district court has acted within its jurisdiction and rendered a decision which, even if erroneous, involved no abuse of power. The system under which Mallard was appointed was reasonably designed to accommodate the needs of the litigants, the bar, and the court.

ARGUMENT

I. 28 U.S.C. SECTION 1915(d) RECOGNIZES THE POWER OF FEDERAL DISTRICT COURTS TO REQUIRE ATTORNEYS TO REPRESENT INDIGENTS IN CIVIL CASES

By its terms, 28 U.S.C. section 1915(d) authorizes a federal court to "request an attorney to represent any such person unable to employ counsel . . . ." The issue as framed by Mr. Mallard is whether the court's power to *request* an attorney's service is intended to embrace the power to *require* it.

The Circuit Courts of Appeal have divided on the question. While some circuits have clearly held that courts may require such service under section 1915(d), *see Nelson v. Redfield Lithograph & Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984), *Whisenant v. Yuam*, 739 F.2d 160 (4th Cir. 1984), others have just as clearly held that the statute grants no power to compel an attorney to provide representation, *see U.S. v. 30.64 Acres of Land*, 795 F.2d 796 (9th Cir. 1986), *Reid v. Charney*, 235 F.2d 47 (6th Cir. 1956).

Still other circuits either appear on both sides of the issue, *compare Caruth v. Pinkney*, 683 F.2d 1044 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) with *McKeever v. Israel*, 689 F.2d 1315 (7th Cir. 1982), or characterize the statute as granting the power to "appoint" counsel, without forthrightly discussing the issue of compelling an attorney's service, *see e.g., Hodge v. Police Officers*, 802 F.2d 58 (2nd Cir. 1986).

A. SETTLED PRINCIPLES OF STATUTORY CONSTRUCTION SUGGEST THAT THE COURT HAS THE POWER TO COMPEL AN ATTORNEY'S SERVICE

Petitioner invokes the principle that statutory language should be accorded its plain meaning and argues that the word "request" does not and cannot include an element of compulsion.[3] But another fundamental principle of statutory construction bears on this question as

[3] The meaning of the word is not as plain as Petitioner suggests. Webster's Ninth New Collegiate Dictionary (1985) includes: "request: the state of being sought after: DEMAND." *Id.*

(Continued on following page)

well, namely the rule that statutory language is not to be given an interpretation which renders that language superfluous. *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986) ("It is an 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative.' [Citation omitted.]").

It is difficult to imagine that a federal court would believe that statutory authorization was needed before it could ask (not compel, but simply *ask*) a lawyer to assist a poor person in judicial proceedings. Whatever the outermost limit might be of a federal court's inherent power to *compel* a lawyer's service, it has never been so doubtful as to call into question the court's ability to ask a lawyer to volunteer to provide representation in a case before the court.[4]

(Continued from previous page)

at 1001. Moreover, it is the plain meaning of the word as used in 1892, when the statute was enacted, which is relevant. Anderson's Law Dictionary (1889), notes that 'request' and 'require' are words of the same origin, and that their "somewhat different meanings . . . are really more distinctions in intensity than in effect or substance." *Id.* at 885-6. The entry in the 1883 Dictionary of American and English Law cites several cases under the heading: "REQUEST, (synonymous with 'require')". *Id.* at 1109.

[4] The construction given section 1915(d) by the district court does not impinge upon but is consistent with its inherent power, fully discussed in Brief Point III of Amicus Association of the Bar of the City of New York. The District Court's inherent power to regulate attorneys practicing before it has been recognized in cases of abuse of the judicial process, *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980), and sanctions

(Continued on following page)

If this is so (and it is hard to deny without casting into doubt the very notion that federal courts are vested with some measure of inherent power), then Petitioner's interpretation of the "request" language of section 1915(d) renders that provision a nullity. To give the statutory language meaningful effect, it must be understood to grant courts more than the "power" to plead with lawyers for their cooperative support in administering justice. *See United States v. Powers*, 307 U.S. 214, 217 (1938), quoting from *Bird v. United States*, 187 U.S. 118, 124 (1902) ("There is a presumption against a construction which would render a statute ineffective or inefficient. . . ."). *See also Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 392 (1939) (That interpretation is preferred "which will preserve the vitality of the Act and the utility of the language in question.").

It is more plausible that Congress viewed a court's "request" that an attorney provide service to be tantamount to a directive. A court's power in directing the activities of the attorneys who appeared before it was perceived by Congress to be such that a request by the court was, from the viewpoint of the attorney (an "officer of the court"), indistinguishable from a command. When

---

(Continued from previous page)

for failure to prosecute. *Link v. Wabash Railroad Co.*, 370 U.S. 626 (1962). Similar to the example in this case, inherent power may be exercised by "courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Link*, 370 U.S. at 625-626. Case management includes the power to appoint "appropriate instruments". *Ex parte Peterson*, 253 U.S. 300 (1920). Members of the bar, like auditors and examiners, are another of those instruments whose appointment may be necessary for the administration of justice.

section 1915(d) was considered, Congress could certainly have believed that submission by an attorney to the express desires of the court was taken for granted. Any distinction between "request" and "require" was unknown in the context. Reported challenges of a court's authority to compel a lawyer's service are, after all, a modern phenomenon (as opposed to later requests for compensation).[5]

B. LEGISLATIVE HISTORY AND HISTORICAL CONTEXT SUGGEST THAT CONGRESS INTENDED SECTION 1915(d) TO BE SUPPLEMENTARY TO CONTEMPORARY PRACTICE.

The wording of section 1915(d) is ambiguous.[6] The legislative history suggests that Congress intended that district courts have the power to compel representation of indigent civil clients. Section 1915(d) is a recognition of

---

[5] Perhaps this is a result of judicial exposition on the statutory language. For the first forty years after the enactment of section 1915(d), each decision used the word "assign" to describe the statute, including this court in 1948. *Adkins v. E.I. DuPont De Nemours & Co. Inc.*, 335 U.S. 331, 342-343 (1948). ("As pointed out, section 4 of the statute makes it abundantly clear that poor litigants shall have the same opportunity to be represented by counsel as litigants in more fortunate financial circumstances."). In a contemporary statement describing the possible requirements of bar membership, this Court suggested that "a non-resident bar member like the resident member, could be required to represent indigents . . . ." *S.Ct. of New Hampshire v. Piper*, 470 U.S. 274, 287, and citation at n. 22 (1985).

[6] Although Petitioner argues to the contrary, his position is negated by the split in the circuits on the very question posed.

that intent and the power of the court. Where the wording of the statute is ambiguous, the court may consider the legislative history to discern the intent. *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206 (1984). Words used must be looked at in light of their contemporary meaning and usage. *Lake County v. Rollins*, 130 U.S. 662 (1889).

1. Legislative History

At least part of the impetus for enacting the original *in forma pauperis* legislation in 1892 was to grant the federal courts a power which eleven states had at that time granted their own courts. The House Report from the Committee on the Judiciary which accompanied the proposed *in forma pauperis* legislation stated that "[m]any humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment."[7] It is noteworthy that of the eleven state statutes which provided for the appointment of counsel, ten explicitly prohibited the attorney from taking a fee.[8]

When the federal legislation was proposed in the House, it was entitled and referred to as an Act "providing when plaintiff may sue as a poor person and when

---

[7] H.R. Rep. No. 1079, 52d Cong., 1st Sess. 1 (1892).

[8] Fisch, Coercive Appointments of Counsel *In forma Pauperis*: An Easy Case Makes Hard Law, 50 Mo. L. Rev. 527, 547 (1985).

counsel shall be assigned by the court"[9], which "assignment" language was uniformly used in subsequent references.[10] To the drafters of the section, the words "request" and "assign" were interchangeable.

One exchange during the debate over the bill provides considerable insight into the basic approach which was embodied in the bill. At one point Representative Stone asked the sponsor of the bill how court officers were to be paid, and whether they were being forced to work for nothing. Representative Culbertson responded:

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.[11]

Admittedly, this exchange may have been limited to those "officers of court" who were required under another section of the bill to "issue, serve all process, and perform all duties in such cases."[12] Nevertheless, this treatment of the judicial officers is telling. If non-attorney court personnel were being required to perform their respective services without pay, it is all the more likely that attorneys, who were doubtless better compensated

---

[9] 23 Cong. Rec. 5199 (1892); 27 Stat. 252 (1892).

[10] *Id.* at 5245, 6192, 6264, 6330, 6348, 6543.

[11] *Id.* at 5199.

[12] "Sec. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases." *Id.* at 5199.

and who had acknowledged professional obligations, would be expected to serve unpaid. Indeed, limiting the compensation discussion to non-attorney personnel suggests again that it was assumed that attorneys would serve without pay by virtue of the traditional duties of the profession.

Although the legislative record of the enacting Congress does not reflect any forthright discussion of whether section 1915(d) grants a court the power to compel an attorney's service, the United States Senate later had occasion to consider the issue in a closely analogous situation. Senator Sam Ervin offered amendments dealing with the court's power to appoint counsel to represent complainants in suits under Titles II and VII. Each provided that "the court may appoint an attorney" for the civil rights complainant. 42 U.S.C. § 2000a-3(a); 42 U.S.C. § 2000e-5(f)(1). "My amendments," Ervin stated, "would merely specify that the judge could not appoint an attorney to represent a complaining party in private litigation under those two titles without the consent of such attorney."[13]

The amendments were defeated by a vote of seventy-one to twenty-six, with three not voting. Although the language differs, nevertheless this vote reveals that the Senate in a related civil rights context took a firm position on the desirability of compelling attorneys to provide representation at the court's discretion. The earlier

---

[13] 110 Cong. Rec. 14, 201 (1964).

1892 Congress intended to recognize the same prerogative in the courts of the day through the enactment of section 1915(d).

2. Original Statutory Language

The original 1892 statute provided, in pertinent part, that "the court may request any attorney of the court to represent such poor person. . . ." Chap. 209, 27 Stat. 252, enacted in 1892. In interpreting the force of the word "request", it is worth noting that request was first paired with the phrase "any attorney of the court." The use of the word "any" suggests an unrestricted range of choice on the part of the judge selecting counsel. It would have been unnecessary to explicitly provide the court an unrestricted range of choice if the court were only empowered to issue a request which the lawyer could freely decline.

Furthermore, the language "attorney of the court" calls to mind the phrase "officer of court" and its attendant sense of connectedness and obeisance to the court. The change in language to its current form may reflect later linguistic habits and conventions, but does not indicate any intention to alter the original thrust of the provision.[14]

3. Statement of Purpose

In enacting the *in forma pauperis* statute, Congress was motivated by its belief that access to the courts

---

[14] The change to the current language of subsection (d) was effected in 1948. The 1952 edition of the United States Code Annotated refers to the change only as one of the "changes in phraseology."

should not be denied "for want of sufficient money or property to enter the courts under their rules."[15] "Will the government allow its courts to be practically closed[16] to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?" H.R. Rep. No. 1079, 52nd Cong., 1st Sess. 1 (1892).

Congressional concern that the courts not be "practically closed" to citizens was expressed through a mechanism for waiving court costs and through the language "supplementing" the power of the court to provide legal counsel to the poor.[17] Petitioner argues that Congress saw a fundamental need, cast it in terms of the vindication of "valid and just rights" of "citizens", and then contributed no meaningful solution, or granted the courts no effective power. It should instead be assumed that the law Congress passed to meet a clearly identified need was intended to be equal to the task.

---

[15] H.R. Rep. No. 1079, 52d Cong., 1st Sess. 2 (1892).

[16] To the pro se litigant, access to court may be denied just as effectively by denial of counsel, though not as efficiently or abruptly as imposition of a filing fee.

[17] *See United States v. Bower*, 698 F.2d 560, 566 (2d Cir. 1983), regarding the Criminal Justice Act, 18 U.S.C. § 3006A "supplementing" the court's inherent power to appoint counsel, discussed in Brief Point III of Amicus Brief of Association of the Bar of the City of New York.

4. English Predecessor

One of the earliest cases to interpret section 1915(d) used the word "assign" in discussing the statute. *Brinkley v. Louisville & N.R. Co.*, 95 F. 345, 353 (C.C.W.D. Tenn. 1899). The court in *Brinkley* suggested that the then recently-enacted *in forma pauperis* statute should be interpreted in the light of the early English statute of Henry VII after which the American law was said to be modeled.[18]

The English statute in question, enacted in 1495, and in effect until 1883, was recently described and quoted as follows:

> It stated that the chancellor should assign 'learned counsel and attornies' for the preparation of suits 'without any reward taking therefore; and after the said writ or writs be returned, if it be afore the King in his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same: and likewise the justices shall appoint attorney and attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help and business in the same'.[19]

---

[18] The *Brinkley* court declined to exercise its discretion to appoint a lawyer for the indigent before the court, as that person was a lawyer and able to represent himself.

[19] 11 Henry 7, c. 12 (1495), quoted in Shapiro, The Enigma of the Lawyers' Duty To Serve, 55 N.Y.U.L. Rev. 735, 741 (1980). The "discretion" (line 7) evidently is that of the justices, not counsel. The same statute in an unquoted portion provides waiver of costs to impoverished litigants "by the discretion of the Chancellor". See Maguire, Poverty and Civil Litigation, 36 Harv. L.Rev. 361, 373 (1923).

The American statute appears to be a modernization of the language of the English law, but does not appear to alter the basic approach. Indeed, had Congress wished to distinguish the operation of its new law from that of its notable English predecessor, it would have done so in clear terms.

5. Historical Context

One commentator has suggested that the choice of the word "request" in section 1915(d) was not intended to deny the court the power to compel an attorney's services, but rather was intended to be synonymous with "assign" and "appoint." The statutory language was employed, it is argued, in an effort to convey to the federal bench that a litigant need not request counsel before the court could arrange an appointment–the court may act *sua sponte*, and issue its own "request."[20]

But again, the most plausible explanation for Congress' use of the word "request" is that the differences between "request" and "assign" were simply not seen as meaningful. The tradition of service by lawyers to the

---

[20] Dow, Appointment of Counsel and Section 1915(d); Pauper Privilege and Judicial Discretionary Duty, unpublished manuscript being prepared for publication under the supervision of Professor Geoffrey C. Hazard, Jr., Yale Law School; relevant portions are reproduced in the Appendix III. Dow notes that earlier practices involving assignment of counsel sometimes placed unreasonable obstacles in the impoverished litigant's path and burdened the applicant unduly. As to modern statutes which authorize appointment upon application, *see e.g.*, 42 U.S.C. § 1971 (f) (1982); 42 U.S.C. § 2000e-5(f)(1) (1982).

courts was too well established to admit of doubt and is reflected in this Court's own pronouncement, forty years after the enactment of section 1915(d), that "[a]ttorneys are officers of the court, and are bound to render service when required by . . . appointment."[21]

This tradition of professional service would have been as readily perceived by legislators in 1892 as it was by this Court in 1932. In 1868, in the context of criminal defense, Professor Thomas Cooley wrote:

> The humanity of the law has generally provided that, when the prisoner is unable to employ counsel, the court may designate some one to defend him, who shall be paid by the government; but when no such provision is made, it is a duty which counsel so designated owes to his profession, to the court engaged in the trial, and to the cause of justice, not to withhold his best exertions in the defence of one who has the double misfortune to be stricken by poverty and accused of crime. No one is at liberty to decline such an appointment, [footnote omitted] and it is to be hoped that few would be disposed to do so.[22]

At least one contemporary commentator has concluded that "the notion that an unwilling lawyer could be forced to serve without fee . . . seems never to have found

---

[21] *Powell v. State of Alabama*, 287 U.S. 45 (1932).

[22] Cooley, *Constitutional Limitations* (1868), p. 334. As part of the omitted footnote, Cooley adds: "[A] court has the right to require the service, whether compensation is made or not; and that counsel who should decline to perform it, for no other reason than that the law does not provide pecuniary compensation, is unfit to be an officer of a court of justice" p. 334, n.1.

universal acceptance."[23] But universal acceptance is a needlessly demanding standard. In 1892, the legal profession's own general view of itself involved a strong duty to serve the court in administering justice to the poor. It is reasonable to presume that Congress, enacting *in forma pauperis* legislation, was aware of this general perception.

II. PUBLIC POLICY CONSIDERATIONS SUPPORT RESPONDENT'S INTERPRETATION OF SECTION 1915(d)

To interpret ambiguous statutes, this Court seeks "to find that interpretation which can most fairly be said to be imbedded in the statute, in the sense of being most harmonious with its scheme and with the general purposes that Congress manifested." *NLRB v. Lion Oil Co.*, 352 U.S. 282, 297 (1957) (Frankfurter, J., concurring in part and dissenting in part). *See also Watt v. Alaska*, 451 U.S. 259, 265-266 (1981).

Policy considerations are properly brought to bear in statutory interpretation, but only to the extent that "specific policy choices fairly can be attributed to Congress itself." *Dawson Chemical Co. v. Rohm & Haas Co.*, 448 U.S. 176, 221 (1980).

The policy discussions which follow are intended to serve four purposes: to shed light on the policy concerns which likely animated Congress; to discern the appropriate breadth of the inherent power possessed by federal courts; to provide a proper context for determining whether the district court acted reasonably and

---

[23] Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L. Rev. 735, 753 (1980).

pursuant to its constitutional duties; and to counter some of the dubious policy arguments raised by Petitioner and by the California Amici.

A. FEDERAL COURT LITIGANTS WHO CANNOT OBTAIN COUNSEL MAY BE DENIED JUSTICE

It is the rare *pro se* citizen asserting or defending against claims in federal court who is not greatly disadvantaged. The disadvantage is daunting enough not only to keep some from persevering in asserting their rights, but also to keep many others from asserting them in the first instance. It is compounded in the case of citizens who must contend with other impediments, natural or circumstantial, such as a lack of education, or the restrictions of institutionalization.

Societal efforts to meet this need for legal help have been halting and inadequate. As the brief of Amicus Legal Services Corporation of Iowa notes, federal funding for the Legal Services Corporation, the primary vehicle for providing legal help to the poor in civil cases, has never been adequate to meet the need. While a patchwork of other sources of legal assistance exists, no one seriously asserts that the poor have sufficient access to counsel in civil cases. That the need exists is conceded by Amicus State Bar of California. Brief p. 19. It is one of the means chosen by Congress and the Iowa District Court to address that need, with which Amicus and Petitioner disagree.

Just as it is unreasonable to contend that civil legal help to the poor is in ample supply, it is unfortunately

just as unreasonable to contend that some form of mandatory *pro bono*, standing alone, will meet the need. The wisdom of any one component, or of the construction of any system designed to fully address this need, are issues of public policy best left to Congress and the state legislatures. The issue for the Court is narrower. Could Congress have reasonably believed that providing courts with the discretionary power to direct counsel to represent indigents would foster meaningful access to the courts?

B. THE INVOLVEMENT OF COUNSEL BENEFITS THE COURTS

Courts have repeatedly acknowledged the benefits trial judges and appellate courts derive from having counsel present a case which would otherwise have been presented *pro se*. *See e.g., Heidelberg v. Hammer*, 577 F.2d 429, 431 (7th Cir. 1978)(" . . . [I]t is extremely helpful to the court to have the plaintiff represented by counsel in a case such as this [a prisoner's section 1983 action]. . . . Although a court is understandably reluctant to impose on an attorney the burden of representing a party in a civil case without a fee, the attorney who accepts such an appointment can perform a valuable service, if only in preventing the waste of valuable judicial time."); *Ulmer v. Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) ("The district court should also consider whether the appointment of counsel would be a service to Ulmer and, perhaps, the court and defendant as well, by sharpening the issues in the case, shaping the examination of witnesses, and thus shortening the trial and assisting in a just determination."). *See also Bounds v. Smith*, 430 U.S. 817, 826 (1977)

("Even the most dedicated trial judges are bound to overlook meritorious cases without the benefit of an adversary presentation.").

Court calendars are notoriously crowded, and an attorney helps preserve judicial resources by bringing his or her legal judgment to bear in winnowing out duplicative witnesses, abandoning ineffective arguments or lines of inquiry, and generally streamlining proceedings. The special solicitude and latitude a court grants the *pro se* litigant, while serving to diminish somewhat the ill-effects of lack of counsel, is itself likely to further drain the court's resources.

C. CONGRESS INTENDED TO RECOGNIZE THE PUBLIC POLICY CONSIDERATIONS WHICH SUPPORT A SYSTEM UNDER WHICH LAWYERS MAKE PRO BONO CONTRIBUTIONS TO THE ADMINISTRATION OF JUSTICE

The interpretation of section 1915(d) urged here is consistent with the long tradition of the lawyer's professional obligation to the poor, to the courts, and to the administration of justice.

1. Historical Background

The lawyer's duty to represent impoverished litigants at the instance of the Court is deeply rooted, and extensively discussed in *United States v. Dillon*, 346 F.2d 633, 636 app. (9th Cir.), *cert. denied*, 382 U.S. 978 (1965), and cited with approval in *Hurtado v. United States*, 410 U.S. 578, 589 (1973).

The *Dillon* court noted that English historical records from as early as 1292 reveal the prayer of plaintiff's that the court "grant them a serjeant . . . for that they are poor folk." *Dillon*, 346 F.2d at 636, n. 2. Presumably this prayer evidences some disposition on the part of the courts to grant such entreaties. The practice of representing the poor upon court assignment, without fee, extends at least to fifteenth-century England, where "serjeants-at-law" could be required by the courts before which they practiced "to plead for a poor man." *Dillon*, 346 F.2d at 636.

It is not surprising that when the American legal profession became sufficiently coherent and self-conscious to express its own views as to its duties, the *pro bono* obligation and the obligation to assist in the administration of justice were given prominence. The first detailed treatments of the American lawyer's ethical responsibilities were set forth by Baltimore lawyer David Hoffman in "Fifty Resolutions In Regard To Professional Deportment",[24] and George Sharswood's 1854 "Essay on Professional Ethics".[25] These premier works "were the progenitors of the profession's major codes of ethics. The draftsman of the Alabama Code of Ethics, Judge Thomas Goode Jones, relied heavily on the earlier works; the Alabama Code was the model for the ABA Canons [of Professional Ethics of 1908] which in turn was the basis

---

[24] D. Hoffman, Fifty Resolutions, 2 A Course of Legal Study 752 (2d Ed. 1836).

[25] G. Sharswood, A Compend of Lectures on the Aims and Duties of the Profession of the Law (1854).

for the Model Code [of Professional Responsibility of 1969]".[26]

Hoffman refers in Resolution VI to the lawyer as "an officer of the court" obligated to those unable to afford counsel. Resolution XVIII states:

> Those who can afford to compensate me, must do so; but I shall never close my ear or heart because my client's means are low. Those who have none, and who have just causes, are, of all others, the best entitled to sue, or be defended; and they shall receive a due portion of my services, cheerfully given.

George Sharswood echoed the nature of the obligation:

> There are many cases, in which it will be [counsel's] duty, perhaps more properly his privilege, to work for nothing. It is to be hoped, that the time will never come, at this or any other bar in this country, when a poor man with an honest cause, though without a fee, cannot obtain the services of honorable counsel, in the prosecution or defence of his rights.[27]

To Sharswood, an attorney held "an office in the administration of justice, held by authority . . . [of] the majesty of the commonwealth". Because of the rights and privileges granted "to no other class or profession", a duty was owed in recompense.[28]

The ABA Canons of Professional Ethics of 1908 built upon these foundations. Canon 12 stated that "[i]n fixing

---

[26] Patterson, Legal Ethics and the Lawyer's Duty of Loyalty, 29 Emory L.J. 909, 935 (1980).

[27] G. Sharswood, supra, at 83.

[28] G. Sharswood, *Id.* at 11.

fees it should never be forgotten that the profession is a branch of the administration of justice and not a mere money-getting trade." The Canons refer to "the office of attorney" (Canon 15), and even pronounce attorneys "ministers" of the law (Canon 32), with the "duty of aiding in the administration of justice." (Canon 22.)[29]

These descriptions of the profession have been supplemented by modern observers. *See e.g.*, Woodrow Wilson, address to the American Bar Association in 1910, "The Lawyer and the Community", 35 A.B.A. Reports 419, 435 (1910) ("You are not a mere body of expert business advisors in the field of civil law or a mere body of expert advocates. . . . You are the servants of the public, of the state itself. You are under bonds to serve the general interest . . . "); Henry S. Drinker, *Legal Ethics* 5 (1953) (Two of the "[p]rimary characteristics which distinguish the legal profession from business are: 1. A duty of public service, of which the emolument is a by-product . . . 2. A relation as an 'officer of the court' to the administration of justice . . . "); Roscoe Pound, *The Lawyer From Antiquity to Modern Times* VII (1953) ("The legal profession is a public profession. Lawyers are the public servants. They are the stewards of all the legal rights and obligations of all the citizens. It is incumbent on stewards, if they are to be faithful to their trust, to render an accounting from time to time.").

---

[29] For a discussion of the history of the debate over whether this duty should result in a mandatory *pro bono* component, *see State ex rel Scott v. Roper*, 688 S.W.2d 757, 763-764 (Mo. Banc. 1985.)

2. The Nature Of A Profession

The practice of law is distinguished from a business or trade by its high standards of conduct and commitment to public service. The earning of a livelihood is to be considered incidental to its primary purpose, namely, "the pursuit of the learned art in the spirit of public service."[30]

In Iowa, that public service requires *pro bono* work. It is against this backdrop that the orders of the district court must be viewed. "Every lawyer, regardless of professional prominence or professional workload, should find time to participate in serving the disadvantaged. The rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of *each lawyer*. . . ." Iowa Code of Professional Responsibility for Lawyers, EC 2-27 (emphasis added).

For Iowa lawyers this Ethical Consideration is not merely aspirational. The Iowa Supreme Court has repeatedly held that compliance by Iowa lawyers with the terms of Ethical Considerations is mandatory, and that violation of an Ethical Consideration, standing alone, provides grounds for disciplinary action. *See Committee On Professional Ethics and Conduct of State Bar Ass'n v. Behnke*, 276 N.W.2d 838, 840 (Iowa 1979), appeal dismissed 444 U.S. 805 (1979). In acknowledgement of duty, the Iowa lawyer upon admission to the bar takes a statutory

---

[30] R. Pound, *The Lawyer From Antiquity to Modern Times* 5 (1953).

oath, "[n]ever to reject for any consideration personal to the attorney or counsellor the cause of the defenseless or oppressed." Iowa Code § 602.10112(7) (1987).

Lawyers have de facto control over the distribution of a fundamental and valuable resource, namely access to society's tribunals, or, at the highest level of abstraction, justice. Through license and regulation, the state actively excludes non-lawyers. This vigorous restriction of the unauthorized practice of law is undertaken in the public interest. Lawyers, as well as the public in general are the beneficiaries of those restrictions. With the license to dispense this resource for a fee comes certain duties, including the duty to see that the poor and unpopular are not excluded.

The argument that this duty could be expected of all professions and state-licensed occupations is simply not valid. In granting lawyers the exclusive right to advise on the law and advocate in the courts, lawyers are placed in a unique role, with roots deep in the Constitution. The societal importance of the role of the lawyer is reflected in the constitutional right to counsel. The concept of justice through fair treatment in the courts occupies a central role in our constitutional framework.[31] Other professions are vital. Other licensed occupations receive and

---

[31] "The United States Constitution provides in part: 'We the People, of the United States, in order to form a more perfect union, establish Justice . . . ' Noting that our forefathers designated the *establishment of justice* of such priority as to

(Continued on following page)

deserve state regulation. But the Constitution is silent on the subject of medicine, dentistry, engineering, accounting, architecture and education.

Society permits only one group to earn a living – in most cases, a very good living – through the effective control of access to the courts and the consequent dispensation of justice. That special obligations should attend this privilege, including the obligation to enable meaningful access to the courts for impecunious citizens, is not unreasonable.[32]

III. CONSTITUTIONAL ARGUMENTS

A. THE CONSTITUTIONAL QUESTIONS PETITIONER RAISES FOR THE FIRST TIME IN HIS BRIEF TO THIS COURT OUGHT NOT BE CONSIDERED

Neither the magistrate, the U. S. District Court, nor the Eighth Circuit Court of Appeals were presented constitutional questions for their consideration in this cause. The Petition for Certiorari identified no constitutional questions.

(Continued from previous page)

make it the second phrase of that magnificent document, ABA President Robert Raven contends that they intended government has the primary responsibility to ensure that legal services are available to the poor. I couldn't agree more. Our profession, like any profession has a duty to supplement the effort of government." President David Funkhouser, "President's Letter", Iowa State Bar News Bulletin, Vol. 48, No. 9, October, 1988.

[32] See also, H. Drinker, *Legal Ethics* 59 (1953) ("In recognition of these exclusive privileges the lawyer is charged with certain obligations to the public [including the duty] to represent without charge those unable to pay.")

In justifying the late transformation of this statutory interpretation question into a multi-faceted constitutional issue, Petitioner observes that under Supreme Court Rule 21.1(a) the statement of the question presented in the Petition for Certiorari is "deemed to comprise every subsidiary question fairly included therein." He suggests this rule permits the introduction of any and all constitutional issues which an appellant might belatedly conceive, since the avoidance of constitutional difficulties is a basic principle of statutory construction.[33]

The existing record does not embrace sufficient facts to allow for a fair and fully-informed decision on the newly-introduced constitutional questions. The record should reveal a far more detailed picture of Mallard's circumstances, the mechanics of the assignment system, and the level of need of the *pro se* litigants as well as the courts, as justification for the use of the power of assignment.

Specifically, a thorough exploration of the shades of constitutional meaning in this context should take into account: the nature and extent of *pro bono* work Mallard performed during the relevant period; the full range of

---

[33] Petitioner also suggests that this case involves "appropriate circumstances" for consideration of these new issues. R. Stern & E. Gressman, *Supreme Court Practice*, Sections 3.24, 6.25, and 6.26 (6th Ed. 1986). Cases in which the Court has found "appropriate circumstances" have generally involved one or more of the following factors: (1) origination in federal rather than state court; (2) interpretation of federal rather than state law; (3) presence of sufficient facts in the record to allow for a fair and intelligent decision on the new issue; (4) opportunity for opposing parties to present briefs on the new issue; and (5) relevance of the new issue to an intelligent resolution of the case.

Mallard's current practice at the time of the assignment (it was "primarily" a "business and securities law practice"); details concerning Mallard's past litigation and courtroom experience; Mallard's level of activity in the three federal court cases in which he appeared in early 1987; Mallard's income from the practice of law, and the degree of financial hardship (if any) the assigned representation would create; the extent of practical support available to Mallard, through his own law firm and other resources; the intensity and nature of Mallard's dislike for "confrontational and accusatory speech", as this relates to his first amendment claims; figures indicating the likelihood of success of *pro se* section 1983 suits, as compared to section 1983 suits in which counsel appears; the frequency with which attorney fees are recovered by assigned counsel from the opposing party, and the amounts of such recoveries; the extent of the benefit derived by the court from the service provided by assigned counsel.[34]

Petitioner's belated introduction of constitutional questions into this cause has raised issues too important

---

[34] That these are factors to be evaluated is discussed in Shapiro, "The Enigma of the Lawyers' Duty to Serve", 55 Harv. L. Rev. 735, 755 (1980). If the burden of the appointment far outweighs the benefit conferred through the license to practice, then the Fifth Amendment may require compensation. *See also Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("an unreasonable amount of required uncompensated service might qualify."). The District Court of Iowa however followed a procedure which insured Petitioner was not overburdened, had he ever made that claim.

to be decided on the available record. Without waiver, Respondent will discuss each of his claims.

B. COMPELLING MALLARD TO PROVIDE REPRESENTATION IN THE *TRAMAN* CIVIL RIGHTS CASE DID NOT VIOLATE HIS FREEDOM OF SPEECH

Mallard argues that he cannot be compelled to provide representation in the *Traman* case "because such representation necessarily requires the exercise of his speech (i) against his will (in light of his belief that he is not competent to undertake the representation) and (ii) in a manner that is contrary to his good conscience (in light of his dislike for confrontational and accusatory speech)." Petitioner's Brief, p. 40.

In support of this position, Mallard cites *Elfbrandt v. Russell*, 384 U.S. 11 (1966) (striking down a loyalty oath required of state employees), *Bates v. State Bar of Arizona*, 433 U.S. 340 (1977) (restricting governmental limitations on an attorney's right to engage in commercial speech), and *Baird v. State of Arizona*, 401 U.S. 1 (1971) (prohibiting the state from conditioning the practice of law by an otherwise qualified person upon certain views, beliefs, or associations). These cases do not address the issue presented by the Mallard appointment.

While Mallard attempts to import the grave concerns which arise when individuals are forced to act against the dictates of conscience, such concerns do not fairly apply. Mallard's unexplained "dislike" for certain manners and tones of speech appears to be a simple matter of temperament and taste, not rising to the level of conviction or conscience. Mallard is not being asked (let alone

required) to accept any particular point of view or to express any particular belief.[35] While it is true that his assignment as counsel in the *Traman* case will doubtless require him to speak and write, such activity is central to the notion of advocacy, and advocacy is central to the practice of law, Mallard's chosen profession.

This Court upheld the payment of required dues to an integrated bar, as against a first amendment challenge. "Payment of $15.00 as a condition of special privilege does not violate any provision of the Constitution." *Lathrop v. Donohue*, 367 U.S. 820, 865 (1961). Although the dissent was concerned with the free speech implications of the possibility of objectionable use of this compulsory payment, it is likely that Mallard's appointment on this record would have been approved.

> We would have a different case if lawyers were assessed to raise money to finance the defense of indigents. That would be an imposition of a duty on the calling which partook of service to the public. Here the objection strikes deeper – [that is] not part and parcel of service owing litigants or courts. *Lathrop*, 367 U.S. at 881, Douglas, J., dissenting.

In the context of public service owing to the courts, there is little if any difference demonstrated by Mallard in this record between the payment of money or time. There is nothing peculiar to Mallard or to these *pro se* clients justifying the denial on First Amendment grounds of his obligation of service. Whether section 1915(d) affects the

---

[35] Indeed, in most cases it is unethical for a lawyer to express a personal belief as to the merits of a case or credibility of a witness. DR 7-106(C)(4), Iowa Code of Professional Responsibility.

authority of the Court to require Mallard to act as an advocate in a given case is the issue. Even if constitutional facets of this issue are considered, the record in this matter does not implicate any recognized first amendment rights.[36]

C. THE ATTORNEY ASSIGNMENT SYSTEM THROUGH WHICH MALLARD WAS APPOINTED COMPORTS WITH DUE PROCESS AND EQUAL PROTECTION

The due process requirement of the fifth amendment embraces the analytically separate guarantee of equal protection of the law. *Bolling v. Sharpe*, 347 U.S. 497 (1954). To pass equal protection muster, a "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

---

[36] This first amendment argument might have had more force if the record disclosed: (a) Mallard had deep-seated convictions which directly related to his ability to perform certain tasks inherent in the advocacy role; (b) the *Traman* case involved the assertion of some position which Mallard found personally abhorrent; or (c) representation of the *Traman* clients themselves conflicted with some deeply-held belief of Mallard. Mallard has never asserted any of these positions, and neither has he argued that his "dislikes" rise to the level of impairing his ability to function as counsel. *See* DR 2-110(b)(3) and (C)(4). *See also* EC 2-28 ("The fulfillment of this objective [to make legal services fully available] requires acceptance by a lawyer of his share of tendered employment which may be unattractive both to him and the bar generally.").

Petitioner asserts that the subclass of lawyers who do not participate in the Volunteer Lawyers Project and who qualify for federal court assignment is a suspect class. He cites no authority for this novel proposition. As the suspect classes heretofore recognized by this court have involved groups of people associated with sober histories of invidious discrimination on a broad scale, the attempt to label this subclass of lawyers a suspect class trivializes the very concept. There is no legal or factual justification for the heightened scrutiny of that status.

The federal district court, working with the Volunteer Lawyers Project, devised a rotation system under which attorneys admitted to practice in federal court would be called upon to represent indigent federal court litigants who met the standards for appointed counsel. In order to ensure some measure of recent federal court experience and to do so in an administratively convenient manner, the court automatically exempted attorneys who had not been of record in federal court within the previous five years. Further, the court excluded from consideration bankruptcy court appearances in the reasonable belief that bankruptcy practice is distinct in several significant respects from general federal court practice.

Also excluded from the pool of attorneys subject to appointment were those lawyers participating in the Volunteer Lawyers Project. Again, it is reasonable to exclude those lawyers already involved in *pro bono* work through the Project. While it is true that an attorney might have been actively engaged in *pro bono* work other than

through the Project,[37] the Project constituted the only statewide *pro bono* program, and its roster of participants constituted the only readily identifiable group to which exemptions could reasonably be applied.[38]

Assuming for present purposes that the court's objective of arranging appointment of counsel for qualifying litigants was a valid one, the standards employed in administering the system were rationally related to that objective. The standards further the goal of selecting, in an easily administered fashion, attorneys with at least a modest level of federal court experience who were not already subject to *pro bono* program referrals.

D. COMPELLING AN ATTORNEY TO PROVIDE REPRESENTATION WITHOUT COMPENSATION DOES NOT CONSTITUTE AN UNCONSTITUTIONAL TAKING OF PROPERTY

For purposes of this discussion, it may be assumed that the services which Mallard was called upon to pro-

---

[37] In an October, 1988, Iowa Bar Association survey, 41 percent of *pro bono* work was attributed by answering attorneys to reduced rate court appointments; only 5 percent and 3 percent respectively were attributed to the Volunteer Lawyers Project and *pro bono* court appointments. These statistics are enlightening but inconclusive due to the size of the response to the survey (18 percent). "The News Bulletin", Vol. 48, No. 9, Iowa State Bar Association, October, 1988.

[38] Mallard has never claimed, and the record does not indicate, that he performed *pro bono* work equivalent to Project participation. Had this been the case, the magistrate may have exercised his discretion differently at the outset. *See e.g.*, Order, *Townsend v. Rice*, 84-655-A, Southern District of Iowa, Feb. 10, 1987, attached as Appendix II here.

vide in the *Traman* case would have been uncompensated.[39] Thus, the points of focus are whether such services constitute "private property" and whether requiring such services to be performed constitutes a "taking", within the meaning of the Constitution's just compensation clause ("[P]rivate property [shall not] be taken for public use, without just compensation").[40]

Petitioner devotes no analysis to the issue of how an attorney's services might relate to the "private property" language of the just compensation clause. Instead, he cites *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957)

---

[39] In fact, under the terms of the appointment, Mallard's services would go uncompensated only if the claims of Mallard's clients, claims which had already passed initial screening by the court, ultimately proved unmeritorious, as to any of the issues raised. 42 U.S.C. § 1988. Amici California Attorneys for Criminal Justice and the National Association of Criminal Defense Lawyers strenuously assert constitutional and ethical objections to payment of costs by counsel appointed by the court, a distinction recognized by the Eighth Circuit as well. *Williamson v. Vardeman*, 674 F.2d 1211, 1215 (8th Cir. 1982) ("Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is however constitutionally distinct from merely compelling lawyers to provide their services."). The issue is not however present in this case. Mallard's out-of-pocket costs would be reimbursed in any event.

[40] Although this is civil litigation, Petitioner's argument has significance for criminal cases as well. "If a requirement of uncompensated service in a criminal case does not constitute a 'taking' . . . then it cannot be said categorically that such violations exist in civil appointments. The two kinds of cases differ in degree but not in quality." *State ex rel Scott v. Roper*, 688 S.W.2d 757, 773 (Mo. Banc. 1985).

and *Konigsberg v. State Bar*, 353 U.S. 252 (1957) for the proposition that "[a]n attorney's services constitute 'private property' within the meaning of the Fifth Amendment." Petitioner's brief, page 57.[41]

But *Schware* and *Konigsberg* are not compensation cases. Rather, they interpret that part of the fifth amendment which prohibits the deprivation "of life, liberty or property, without due process of law." In that context, the practice of law was deemed a protectible property interest, and unreasonable standards for admission to the bar were struck down. However, these decisions did not address and do not resolve the different issue of whether a lawyer's services necessarily constitute "private property" within the meaning of the taking clause.

To establish this, Petitioner must show: (1) a reasonable expectation that his services are for his private use only and (2) that compulsory representation without compensation is not "fair". *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 124-125 (1978). In some limited circumstances, services may constitute "property". *Butler v. Perry*, 240 U.S. 328 (1916); Green, "Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance", 81 Columbia L. Rev. 366 (1981). However, an expectation that he

---

[41] His position is made inconsistent by his apparent concession that the language of 42 U.S.C. 2000e-5(f)(1) allows compulsory appointment. Similarly, if compensation for service is made, but at a reduced rate limited by statute, then "just compensation" as constitutionally required has been denied for a portion of those services. *See* 18 U.S.C. § 3006A. A taking cannot be made constitutionally permissible, solely because accomplished by statute.

will never be called upon to represent an indigent civil litigant cannot reasonably be gleaned from this Court's holdings.

Hurtado v. United States, 410 U.S. 578 (1973) reaffirmed the established principle that "the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed." *Id.* at 588. The *Hurtado* case involved the financial losses suffered during pretrial detention by a material witness, compensated by statute at only one dollar a day. The Court noted that there is "a public obligation to provide evidence," and that "this obligation persists no matter how financially burdensome it may be." *Id.* at 589.[42]

In rejecting this constitutional challenge, the *Hurtado* court cited with approval *United States v. Dillon*, 346 F.2d 633 (9th Cir.), *cert. denied*, 382 U.S. 978 (1965), as one of several examples of compulsory public service. *Hurtado*, 410 U.S. at 589. In *Dillon* the Ninth Circuit was confronted with the claim of a lawyer who, having earlier been "conscripted" to represent a prisoner in a proceeding under 28 U.S.C. § 2255, then applied to the court for compensation, arguing that failure to compensate would run afoul of the just compensation clause.

---

[42] In a footnote, the Court quoted Professor Wigmore: "[I]t may be a sacrifice of time and labor, and thus of ease, of profits, of livelihood. This contribution is not to be regarded as a gratuity, or a courtesy, or an ill-required favor. It is a duty not to be grudged or evaded. Whoever is impelled to evade or to resent it should retire from the society of organized and civilized communities, and become a hermit. He who will live by society must let society live by him when it requires to." *Hurtado*, 410 U.S. at 589, n. 10, citing 8 J. Wigmore, Evidence § 2192, p. 72 (J. McNaughton rev. 1961).

In a much-quoted passage, the Ninth Circuit stated:

> An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation and when he is called upon to fulfill it, he cannot contend that it is a 'taking of his services.' 346 F.2d at 635.

The *Dillon* court drew support from *Powell v. State of Alabama*, 287 U.S. 45 (1932), in which this Court described the symbiotic responsibilities. "The duty of trial court to appoint counsel in such circumstances is clear . . . ; and its power to do so even in the absence of statute cannot be questioned. Attorneys are officers of the court, and are bound to render service when required by such an appointment." *Powell*, 287 U.S. at 73.

In rejecting the just compensation argument, the *Dillon* court held that there was no "taking", obviating any consideration of whether the lawyer's services had constituted "private property," *Dillon*, 346 F.2d at 636, although the analysis applies equally to both. Mallard knew upon entering the legal profession and the Bar of the United States District Court for Iowa in particular that some measure of public claim would be made upon his skilled services. Any expectation to the contrary is unreasonable and those services are, to that extent, not "*private* property."[43]

---

[43] Application for bar memberships has been construed as consent to appointment. In a factually similar case, *Lewis v.*

(Continued on following page)

This representation without compensation can be a taking only if the government interferes with "reasonable investment-backed expectations." *United States v. Locke*, 471 U.S. 84, 107 (1985); *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979). See Brief of Amicus State Bar of California, pp. 27-28. All attorneys who take seriously their ethical obligation expect that a portion of their "stock-in-trade" will be given up for *pro bono* work. Any investment decision is based upon the inclusion of that time, not its exclusion. Only the exceptional case would be so great a burden as

---

(Continued from previous page)

Lane, 816 F.2d 1165 (7th Cir. 1987), counsel upon learning of his appointment immediately asked the magistrate to be relieved, alleging incompetency and lack of time. In his denial, the magistrate "indicated that his membership in the southern district bar might be terminated if he declined the assignment." *Id.* at 1166. "Although Adams (counsel) was a reluctant appointee, he did validly consent to represent the plaintiffs." *Id.* at 1168. *See also Branch v. Cole*, 686 F.2d 264, 267 (5th Cir. 1982) ("If the court continues to have difficulty in obtaining the voluntary service of counsel despite their ethical responsibilities, it may wish to limit the compensated practice by members of its bar to those willing to accept their share of indigent cases."); *Family Div. Trial Lawyers v. Moultrie*, 725 F.2d 695, 699 (D.C. Cir. 1984) (" . . . the judges of the superior court repeatedly warn attorneys that they will not be appointed to [statutory] compensated cases if they do not also agree to represent indigent parents in neglect [non-compensated] cases."); Shapiro, "The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U. L.Rev. 735, 746, n. 48 (1980), describing similar analysis in England in 1471.

to run counter to the expectation.[44] There is nothing in this record to even suggest that extraordinary burden on Mallard.

There is no taking where there is an exchange of benefits. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922); *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). Mallard derives the benefits of an esteemed, lucrative and exclusive profession, but he seeks to evade one of its most vital duties. This Court's approach in *Hurtado* rejecting such a position is controlling.

IV. PETITIONER MADE NO SHOWING THAT HIS APPOINTMENT WAS UNREASONABLE UNDER THE CIRCUMSTANCES

As an exercise of section 1915(d) discretion or of inherent power, the question might remain whether the appointment of Mallard, in the circumstances prevailing, constituted an abuse of discretion. What record there is cannot support a finding of abuse but supports the action of the district court. *Roche v. Evaporated Milk Association*, 319 U.S. 21, 32 (1943) (mandamus will not lie where the district court has acted within its jurisdiction and rendered a decision which, even if erroneous, involved no abuse of power).

---

[44] *See Family Division of Trial Lawyers v. Moultrie*, 725 F.2d 695, 705 (D.C. Cir. 1984) ("some pro bono requirements do not constitute a 'taking', we think it equally clear that an unreasonable amount of required uncompensated service might so qualify.").

The system under which Mallard was appointed was reasonably designed to accommodate the needs of the litigants, the bar, and the court.[45] Lawyers licensed to practice in federal court were selected on an alphabetical basis, with adjustments made as necessary for geographical convenience.[46] The panel of potential appointees was divided into thirds and rotated, so that, at most, an attorney would be subject to receiving an assignment no more often than every third year.[47] Out-of-pocket costs of representation were subject to reimbursement by the clerk of court.

---

[45] The litany of procedural, ethical and constitutional problems decried by Amicus State Bar of California, Brief pp. 6-20, are either not applicable to Petitioner Mallard's circumstance as shown on this record or are addressed by the reasonable accommodations contained within the Iowa plan, which can be made to the individual appointee upon a showing of particular circumstances. The Iowa system is consistent with the call for a "conscientious objector" accommodation. A broad constitutional attack on that system is not supported by this record. *See State ex rel Partain v. Oakley*, 227 S.E.2d 314 (W. Va. 1976); Shapiro, The Enigma of the Lawyers' Duty To Serve, 55 N.Y.U. L.Rev. 735, 777 (1980).

[46] Mallard's Fairfield, Iowa office is only 60 miles from the site of incarceration of two of his clients, and that institution was also the focus of the litigated claims.

[47] Amicus Legal Service Corporation of Iowa notes that lawyers are projected to receive appointments once every five to six years.

Lawyers participating in the Volunteer Lawyers Project were exempted from federal court assignments.[48] Lawyers who were temporarily too busy to take on another case were accorded a grace period.[49]

Federal court experience on at least a modest level of competency was assured. Concerns with lack of familiarity with the legal context of the assigned case were met with support efforts by the Project. Such support services included written outlines and research guides pertaining to the legal issue in question, seminars on section 1983 and prisoner litigation,[50] and even consultation with attorneys experienced in the field. Of course, an appointed attorney always retained the option of petitioning the court for appointment of co-counsel, if believed necessary.

---

[48] Participants in the Volunteer Lawyers Project decide what types of cases they are willing to accept, and are free to decline a given referral at any time. As with the federal court assignment system, out-of-pocket costs of representation are reimbursed, and any attorney fees paid under court order by the opposing party may be retained.

[49] The duty not to neglect the cases of current clients might sometimes require a lawyer to decline an appointment temporarily. *See* DR 6-10(A)(3). Amicus State Bar of California attempts to create a "double standard of competency" whereby "a lawyer who is trying to make ends meet may fail to exert the effort required in the indigent's case." Brief, p. 16. This ethical failure by a minority in the bar, is just as possible when *pro bono* time is volunteered and in any event is acknowledged by the appointment process used by the district court.

[50] One such seminar was held on July 31, 1987 in Grinnell, Iowa, only a few weeks after Mallard's appointment. The record does not disclose whether Mallard chose to attend.

Mallard has not argued that he was too busy with other cases, that he performed reasonable *pro bono* service in other contexts,[51] or that the assignment would work a financial or other hardship on him. Rather, he has vigorously (and competently) asserted his own incompetence, focusing on his experience and his preferences.

When the federal magistrate found Mallard to have litigation experience and thus competent, Mallard expanded his argument. Mallard argued to the district court "that he did not like the role of confronting other persons in a litigation setting, accusing them of misdeeds, or questioning their veracity." (J.A. 38)

Having spent two years as a creditor's attorney involved in debt collection and foreclosures in the 1980's, Mallard might be hard pressed to argue persuasively that he is incapable of confrontation. If he is arguing merely that he is less than comfortable with the basic lawyering activities of confrontation and cross-examination, then his point is simply irrelevant. Such predilections would appear to be just the sort of "consideration personal to the attorney" which, under his oath, is never sufficient cause for rejecting "the cause of the defenseless or oppressed." Iowa Code Section 602.10112(7) (1987).

---

[51] Mallard had evidently never chosen to participate in the Volunteer Lawyers Project, and there is no indication on the record that he has performed other *pro bono* work which should be considered in connection with the appropriateness of this assignment.

Mallard sought and obtained membership in the Iowa bar, and in so doing voluntarily accepted the responsibilities and duties of an Iowa lawyer. Mallard took the further step of seeking and obtaining permission to practice before the United States District Court for the Southern District of Iowa, and in so doing must be deemed to have voluntarily accepted participation in the federal court assignment program which had been implemented a year earlier. No circumstance particular to Mallard's situation, or Traman's case, appears on this record which would render his appointment as counsel in any way unreasonable or overly burdensome.

V. THE PERCEPTION OF JUSTICE AS EQUALITY BEFORE THE LAW IS AT ISSUE

The American system of justice espouses and is predicated upon equality of the adversaries before the law. It is the expectation that each party possesses an equal opportunity for presentation of its case to the impartial factfinder, from which presentations, truth will out. Inequality of opportunity[52] affects the validity of the decision, the respect for law and ultimately the very concept of justice itself.

" . . . Some way of providing legal services to those in need must be found. In the absence of those services the adversary process, whatever its shortcomings when all

---

[52] Some inequality of presentation above a minimal level of competence, according to the skill of the advocate, is presumed by the system. This is a difference of degree in what is a recognized presumption of equality of opportunity.

interests are represented adequately, is especially vulnerable. We may disagree on when the "need" is sufficient, and on the ultimate means of eliminating that need, but the basic proposition remains." Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L.Rev. 735, 780 (1980).

The issue of effective access "affects more than just the parties or the bar. It affects all citizens, for the cost of inefficient court proceedings prolonged by unrepresented parties is enormous." Amicus State Bar of California Brief, p. 19. These costs are both direct and indirect. Petitioner and Amici assert that the "solution of the unmet legal needs of the least among us cannot rest solely on the backs of private attorneys". *Id.* at 19. Conversely, neither can a workable, partial solution be discarded because it is only partial. Those other complementary solutions suggested by Amici and the commentators must be concurrently explored, both by the legislative and the judicial branch. "As the Cahns so aptly put it, 'the market is not for legal services: the market is for Justice.' " Cahn and Cahn, Power to the People or to the Profession? – The Public Interest in Public Interest Law, 79 Yale Law J. 1005, n. 16 (1970), quoted in Shapiro, The Enigma of the Lawyers' Duty to Serve, 55 N.Y.U.L.Rev. 735, 780 (1980).

The practice of law is more than a business. Whatever the validity of the assertion of contemporary "deprofessionalism", or the "shrinking nature of the lawyer's special preserve", Shapiro, *Id.* at 771, the practice of law is still imbued with a responsibility for the quality of

justice, which special relationship is possessed by no other profession.[53]

Justice Holmes when admonished by Learned Hand to "Do justice!" retorted: "That is not my job. My job is to play the game according to the rules." (Learned Hand, in Dillard, Irving, *The Spirit of Liberty*, 3rd Ed.; New York: Alfred A. Knopf, 1960, pp. 306-307.) There is nothing in those rules which calls upon the Eighth Circuit to mandate the Federal District Court in Iowa refrain from engaging Petitioner in a cooperative effort to work toward justice.

---

[53] "The moral position of the advocate is here at stake. Partisan advocacy finds its justification in the contribution it makes to a sound and informed disposition of controversies. Where this contribution is lacking, the partisan position permitted to the advocate loses its reason for being. The legal profession has, therefore, a clear moral obligation to see to it that those already handicapped do not suffer the cumulative disadvantage of being without proper legal representation, for it is obvious that adjudication can neither be effective nor fair where only one side is represented by counsel." Lon Fuller, John Randall, Professional Responsibility: Report of the Joint Conference, ABA Journal, Vol. 44, 1159, 1216 (Dec. 1958).

CONCLUSION

It is respectfully suggested that the Order of the Eighth Circuit Court of Appeals denying the writ of mandamus should be affirmed.

Respectfully submitted,

THOMAS J. MILLER
Attorney General of Iowa

GORDON E. ALLEN
Deputy Attorney General
Counsel of Record for Respondent

STEVE ST. CLAIR
Assistant Attorney General

APPENDIX I

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

CHAMBERS OF
HAROLD D. VIETOR
CHIEF JUDGE
UNITED STATES COURTHOUSE
EAST FIRST AND WALNUT
DES MOINES, IOWA 50309

Mailed to all lawyers by Iowa State Bar Association in February 1986.

February 14, 1986

Dear Lawyer:

The Federal Practice Committee of the Iowa State Bar Association has formulated a plan for Federal Pro Bono service in the Northern and Southern Districts of Iowa. It is our hope that with your cooperation we can efficiently serve the needs of indigent civil suit parties pursuant to the *Nelson* and *Hahn* decisions.[1]

To date these needs have been met by a small number of "volunteers", about 4% of Federal practitioners, who have taken cases by an individual request from the Court. The new plan, to be implemented January 1, 1986, will spread this work more equitably among all those admitted to practice in Federal Court. Once the determination of indigency is made the Volunteer Lawyers Project will assume responsibility for case assignment and monitoring. Please review the enclosed material from the Volunteer Lawyers Project for an overview of their program.

In the future we would like to develop a program staffed by lawyers who volunteer (without being drafted). However, until we are able to establish this phase of the

---

[1] *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003 (8th Cir. 1984), *Hahn v. McLey*, 737 F.2d 771 (8th Cir. 1984).

project we continue to rely on the support we have received from you.

Very truly yours,

/s/ Harold D. Vietor
HAROLD D. VIETOR

/s/ Donald E. O'Brien
DONALD E. O'BRIEN

/s/ William C. Stuart
WILLIAM C. STUART

* * * * * * * * * * *

IMPORTANT NOTICE TO ALL
ATTORNEYS PRACTICING IN IOWA'S
NORTHERN AND SOUTHERN FEDERAL DISTRICT
COURTS

* * * * * * * * * * *

Concerning The Immediate Implementation Of A
Federal Pro Bono Referral System

As most Iowa lawyers are now aware, the 8th Circuit Court of Appeals has invoked its supervisory power over federal district courts to provide for the pro bono representation of certain indigent federal court litigants. In *Nelson v. Redfield Lithograph Printing*, 728 F.2d 1003 at 1005 (CA 8, 1984), the Court urged "the chief judge of each district to seek the cooperation of the bar associations and the federal practice committees of the judge's district

to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations . . . "[1]

Volume of appointments – Qualifying litigants have been receiving such appointments since June of 1984. During the first year, a total of 130 such appointments were made in the Northern and Southern Districts combined. The vast majority of these cases are §1983 civil rights actions brought by prison inmates.

Volunteer Lawyers Project – Hereafter, the federal courts will be employing the services of the Volunteer Lawyers Project in arranging appointments. The Volunteer Lawyers Project will maintain for each of the two districts a list of all Iowa lawyers admitted to practice in federal court and, in the Southern District, in good standing in terms of federal C.L.E. credits. The combined lists will embrace about 3,500 lawyers.

Panels – The list of lawyers for each federal district will be divided into three panels. The panels will rotate, so that a lawyer will be on the current list of potential appointees no more often than every third year. The panel of 1986 will be comprised of lawyers with last names A through H; for 1987, last names I through O; for 1988, last names of P through Z. Within each current panel, names will be selected in a systematic manner but

---

[1] The Eighth Circuit's position was further clarified in *Hahn v. McLey*, 737 F.2d 771 (1984) and *In The Matter of Attorney Robert J. Snyder*, 734 F.2d 334 (1984). See also 28 U.S.C. §1915(d) concerning the general power of appointment.

other than by straight alphabetical sequence. Adjustments will be made as necessary to maximize geographical convenience.

Procedure – When the federal district court determines that an indigent litigant qualifies for pro bono appointment of counsel, the court will order the Volunteer Lawyers Project to arrange for representation. The Project will proceed systematically through the list of lawyers, contacting the next lawyer on the current panel and arranging for representation. In proceeding through the list of lawyers, those lawyers already receiving pro bono referrals of state court cases through the Volunteer Lawyers project will generally *not* be requested to accept federal referrals as well. Similarly, those lawyers who have already received federal pro bono appointments since such appointments began in 1984 will be passed over initially.

Costs and fees – Although these cases are pro bono, lawyers may apply to the court for reimbursement of out-of-pocket costs of representation. Written instructions concerning cost reimbursement policies will be sent to each pro bono appointee at the outset of representation. In addition, lawyers appointed under this system are free to seek and keep whatever fee award might be available by statute from the opposing party.

Support services – Varied support services will be available to lawyers desiring assistance in connection with pro bono appointments. Support will include written materials dealing with the substantive and procedural law at issue, periodic seminars dealing with the issues most

frequently arising in this context, and consultation with experienced lawyers.

Contact the Volunteer Lawyers Project (315 E. Fifth, Des Moines, Iowa, 50309; 515-243-2151 or 800-532-1275):

1. If you wish to add your name to the list of lawyers willing to accept occasional referrals of low-income clients in state court actions, or desire more information about such participation;

2. If you are experienced in federal civil rights law, and would be willing to provide occasional consultative services to other lawyers in lieu of receiving direct appointments; or

3. If you are interested in attending a CLE-accredited seminar dealing with the law and procedures commonly arising in federal pro bono cases.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

JAMES TOWNSEND, Plaintiff, vs. BOB RICE & UNKNOWN OFFICERS, Defendant.	)	CIVIL NO. 84-655-A ORDER (Filed Feb. 10, 1987)

A hearing on the motion for permission to withdraw filed January 14, 1987 was held on February 10, 1987. Craig R. Hastings appeared in support his motion.

After discussing the motion with Mr. Hastings at the hearing, Mr. Hastings supplemented his motion regarding his competency to handle the matter. The thrust of Mr. Hasting's concern is his lack of experience as a trial lawyer and his inability to handle a jury case. Mr. Hastings is fully cognizant of his responsibility to provide pro bono services. Mr. Hastings convinced the Court that he has provided substantial pro bono services in the past and is willing to do so in the future. He further indicated a willingness to accept pro bono appointments on matters pending in federal court insofar as they do not require him to act as a trial attorney.

With the record made at the hearing, the Court is satisfied that Mr. Hastings should be granted permission to withdraw in the above-entitled case.

The Court hereby finds that another counsel should be appointed to represent plaintiff in this matter. The Clerk of Court is hereby directed to obtain new counsel for plaintiff in this case under 28 U.S.C. § 1915(d) by referring this matter to the Volunteer Lawyers Project of Iowa.

IT IS SO ORDERED.

Dated this 10th day of February, 1987.

/s/ R. E. Longstaff
R. E. LONGSTAFF
U.S. MAGISTRATE

APPENDIX III

APPOINTMENT OF COUNSEL AND SECTION 1915(d): PAUPER PRIVILEGE AND JUDICIAL DISCRETIONARY DUTY

Steven Dow

Unpublished manuscript being prepared for publication under the supervision of Professor Geoffrey C. Hazard, Jr., reprinted by permission for convenience.

* * *

II. Historical Interchangeability of "Request" and "Assign"

A. *Legislative History*

The legislative history surrounding the enactment of the original federal *in forma pauperis* statute is minimal. The original legislation was passed in 1892 and provided:

> That the court may request any attorney of the court to represent such poor person, if it deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is untrue, or if said court be satisfied that the alleged cause of action is frivolous or malicious.[43]

The law is presumed to have been modeled upon an English statute of Henry VII from 1495.[44]

> It stated that the chancellor should assign 'learned counsel and attornies' for the preparation of suits 'without any reward taking therefore; and after the said writ or writs be returned, if it be afore the King in his bench, the justices there shall assign to the same poor person or persons, counsel learned, by their discretions, which shall give their counsels, nothing taking for the same: and likewise the justices shall appoint attorney and attornies for the same poor person or persons, and all other officers requisite and necessary to be had for the speed of the said suits to be had and made, which shall do their duties without any reward for their counsels, help and business in the same.[45]

A provision, added sometime before 1744 and designed to prevent frivolous and vain cases from being brought, required the pauper to have two counsel sign a petition certifying good cause for the suit and to name the counsel to be assigned by the chancellor.[46] Presumably the indigent had to persuade the two counsel "to donate their services at little or no cost, and if they did, it may well have turned out that they would end up representing the plaintiff in the suit."[47] It is uncertain how often courts appointed lawyers under the statute; however, by late 1800, the courts had "taken a broad plan for eliminating poverty as a hampering factor in civil litigation and by hedging it about here and trimming it there practically wreck[ed] it."[48] The statute was repealed in 1883,[49] nine years before the United States Congress enacted the predecessor to the current section 1915.

The impetus for the federal legislation was the existence of similar laws in several states. The House Report from the Committee on the Judiciary which accompanied the bill explained that "[m]any humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment."[50] By 1892, eleven states had adopted *in forma pauperis* statutes which included provisions for the

appointment of counsel; ten of them expressly prohibited the attorneys from taking a fee.[51]

When the federal bill was proposed in the House, it was described as "providing when plaintiff may sue as a poor person, and when counsel shall be *assigned* by the court."[52] In subsequent proceedings, the legislation was always referred to with the same terminology of court *assignment* of counsel.[53]

In the debate over the bill, a Congressman raised the question of how, since the indigent plaintiff was not required to pay the court costs, the court officers were to receive their pay and wanted clarification about whether they were to be compelled to work for nothing. The bill's sponsor replied,

> We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much *ex-officio* service.[54]

It is clear from the wording of the statute that the attorneys are referred to separately from the other court officers,[55] but the legislature did not explicitly consider or discuss the nature of the attorneys' obligations and duties with respect to uncompensated mandatory service.

The legislative silence regarding the attorneys' plight suggests one of three things: 1) the legislators believed that attorneys obviously could be required to serve under a court appointment; 2) counsel was always so willing to accept court requests that it did not even occur to the legislators that attorneys would ever decline to accept an

appointment; or, 3) Congress thought it was transparently obvious that counsel could not be coerced into accepting court appointments.

In the absence of more detailed legislative history, it is impossible to know which, if any, of the three possible reasons was prevalent. This Note maintains that an analysis of other aspects of the historical situation reveals that a combination of the first two factors predominated in 1892: Congress implicitly assumed that counsel would always serve at a court's request, because the bar had an historical tradition as well as a recognized duty of doing so.[56]

The remedial purpose of the legislation was clear and undisputed: " . . . to open the courts of the United States to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money . . . :"[57] As noted above, Congress clearly did not expect that the statute would be used very often.

The English courts and the state courts in the United States seldom utilized their authority to assign counsel. So too, the federal statute was infrequently used. One commentator writing in 1919 described the situation:

> The system of assignment of counsel looms large in the books, but has amounted to very little in practice. . . . For some reason this power seems never to have been used. . . . The system is so thoroughly in disuse that in many quarters its very existence is denied. The large majority of attorneys do not realize that there is any authority which can require them as a matter of duty to give their services without charge to poor persons.

> It is not easy to state with precision why a system so deep-rooted in the history of our legal institutions should both in England and in the United States fall into such neglect.[58]

He goes on to speculate that reasons for the disuse may include both a judicial failure to realize that people were in need of counsel as well as a reluctance to impose the financial hardship of uncompensated representation on attorneys. While courts were often willing to enforce the attorney's obligation in criminal cases, they seldom employed their power in civil situations.[59]

In the leading case on the attorney's obligation to accept a court appointment without compensation, *United States v. Dillon*,[60] the Ninth Circuit held that a district court order appointing an attorney to represent an indigent criminal defendant was not a taking of the attorney's property requiring compensation under the Fifth Amendment. The Court of Appeals did not distinguish between criminal and civil actions when it noted that:

> representation of indigents under court order, without a fee, is a condition under which lawyers are licensed to practice as officers of the court, and that the obligation of the legal profession to serve without compensation has been modified only by statute. An applicant for admission to practice law may justly be deemed to be aware of the traditions of the profession which he is joining, and to know that one of these traditions is that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order. Thus, the lawyer has consented to, and assumed, this obligation . . . [61]

The court cited and reprinted as an appendix the government's brief, which traced the origins and history

of the attorney's obligation to serve without compensation upon court appointment. The historical summary and analysis provided in *Dillon* may be misguided and not relevant to contemporary practice in the United States;[62] nevertheless, the case demonstrates that the view that unwilling attorneys could be compelled to represent indigents upon court appointment based upon the traditions of the bar was widely held and supports the contention that Congress in 1892 likely subscribed to such beliefs.

Indeed, some forty years after the statute was enacted, in the context of a criminal case, *Powell v. Alabama*,[63] the Supreme Court articulated its formulation of the general duty of an attorney to serve upon court assignment: "Attorneys are officers of the court, and are bound to render service when required by such an appointment."[64]

B. *Early Cases*

The earliest court interpretations of the *in forma pauperis* provision for counsel confirm both the interchangeability of the request and appoint language as well as the power of the court to appoint counsel in civil cases, even when compensation could not be guaranteed. In *Whelan v. Manhattan Ry. Co.*,[65] decided six years after enactment of the statute, a circuit court first ruled that a plaintiff's affidavit stated a cause of action which was not frivolous and then continued:

> It remains, however, for the court to provide an attorney to represent the poor person. . . . The attorney assigned by the court, in the event of nonsuccess,

> will, of course, receive nothing; in the event of final success, he may apply to the court for an order fixing a fair compensation for the services he may actually render . . .
>
> If the attorney who brought the action is willing to continue the litigation on those terms, he will be assigned to represent plaintiff; if not, the court will find some other attorney to prosecute her case.[66]

In the final paragraph, the court did not deny its power to compel an attorney to accept an appointment; rather, it averted the issue completely because it was confident that it could find a willing attorney. The fact that the court chose not to exercise its power does not imply that it did not, in fact, possess the power; it merely confirms the discretionary nature of the provision.

In 1899, in the case of *Brinkley v. Louisville & N.R. Co.*,[67] a Circuit Court suggested looking to the early English statute of Henry VII upon which the federal statute had been modeled in order to determine what the 1892 statute meant in its provision for the assignment of counsel. It chose not to exercise its discretionary power, because it found that the indigent was capable of presenting his case personally since he was a lawyer.

Given that the Congress and courts seemed to use "request" and "assign" synonymously, there may be little importance to the fact that the actual statutory language empowered the court to "request" counsel to serve. Nevertheless, its inclusion is somewhat perplexing due to the fact that the request language did not appear in other statutes[68] and was not derived from the original English law. This anomaly may have arisen because Congress intended to develop an efficacious law that would avoid

the specific problems of the *in forma pauperis* practice in England that had developed as a result of the stringent requirements that the petition be signed by two counsel. As discussed earlier, the English law had been repealed in 1883. Notwithstanding its intent that the law not be used too often, Congress may have sought to afford indigents opportunities to have their cases litigated which the English statute denied.

There is no indication in either the legislative history or early caselaw that the "request" language was specifically chosen with consideration for the potential burden on attorneys. Rather, the overwhelming impetus for the legislation was concern for the plight of indigents. Congress may have presumed that pro se litigants might not even have been aware that courts had authority to appoint counsel. Quite plausibly, the language was intended to urge courts to make appointments even when the indigent had not specifically asked for counsel.[69]

The indigent merely needed to file a statement under oath to commence an action; signature of counsel affirming that the cause of action was neither frivolous nor malicious was not required as it was in England. Thus, if the judge determined that a pauper needed assistance of counsel, he would be able to implement and effectuate his determination *sua sponte*. The early cases interpreting this provision seemed to construe the language to enable the court to appoint counsel regardless of whether the indigent actually petitioned for it.

In *Whelan*, there is no indication that the pauper's petition seeks an assignment of counsel. The action was initially brought with the assistance of counsel, but there

is no reason to believe that counsel sought dismissal or the appointment of alternate counsel. Rather, it appears that the court decided on its own to exercise its discretionary power, once it had determined that the plaintiff was indeed indigent and was stating a cause of action worthy of a trial.

Similarly in *Brinkley*, the court indicated that it would have appointed counsel, despite the fact that the plaintiff had not requested it, if the indigent had not indicated that he was a lawyer capable of handling his case pro se.

Thus, an historical analysis of the original 1892 statute suggests that Congress and the courts have always intended "request" and "assign" or "appoint" to be synonymous. Any dispute or controversy surrounding the particular language should be resolved by examining the underlying purpose of the legislation. The major function and intent of the *in forma pauperis* legislation was to ease the burdens on the poor. Hence, the choice of the request language ought to be construed from an historical standpoint to have broadened the discretion of the court by encouraging the appointment of counsel in accordance with the judge's own appraisal of the pauper's needs.

* * *

---

[43] Act of July 20, 1892, ch. 209, 27 Stat. 252 (now codified at 28 U.S.C. § 1915 (1982) [hereinafter cited only by section number].

[44] Brinkley v. Louisville & N.R. Co., 95 F. 345,353 (C.C.W.D. Tenn. 1899); *see* Duniway, The Poor Man in the Federal Courts, 18 Stan. L. Rev. 1270, 1272 (1966).

[45] 11 Henry 7, c.12 (1495), quoted in Shapiro, *The Enigma of the Lawyer's Duty to Serve*. 55 N.Y.U.L.REV. 735,741 (1980).

[46] Maguire, *Poverty and Civil Litigation*, 36 HARV. L. REV. 362, 377 (1923).

[47] Shapiro, *supra* note 45, at 745.

[48] Maguire *supra* note 46, at 379.

[49] R. SMITH, JUSTICE AND THE POOR 22 (1919).

[50] H.R. REP. NO. 1079, 52d Cong., 1st Sess. 1 (1892).

[51] Fisch, *Coercive Appointments of Counsel* In Forma Pauperis: *An Easy Case Makes Hard Law*, 50 MO. L. REV. 527, 547 (1985).

[52] 23 CONG. REC. 5199 (1892).

[53] *Id.* at 5245, 6192, 6264, 6330, 6348, 6543.

[54] *Id.* at 5199.

[55] *Compare* § 3 ("That the officers of court shall issue, serve all process, and perform all duties in such cases") *with* § 4 ("That the court may request any attorney of the court to represent such poor person").

[56] H.R. REP. NO. 1079, 52d Cong., 1st Sess. 2 (1892).

[57] In enacting an analogous law in 1964, the Senate overwhelmingly rejected an amendment to the appointment of counsel provisions of Titles II and VII of the Civil Rights Act which would have precluded a judge from appointing an attorney without that attorney's consent. 110 Cong. Rec. 14201 (1964).

[58] R. SMITH, *supra* note 49, at 100-01.

[59] *Id.* at 230.

[60] 346 F.2d 633 (9th Cir. 1965) *cert. denied*, 382 U.S. 978 (1966).

[61] *Id.* at 635.

[62] Shapiro, *supra* note 45, at 747.

[63] 287 U.S. 45 (1932).

[64] Id. at 73.

[65] 86 F. 219 (C.C.S.D.N.Y. 1898).

[66] *Id.* at 220-21.

[67] 95 F. 345 (C.C.W.D. Tenn. 1899).

[68] *See, e.g.*, R. SMITH, *supra* note 49, at 231("Under the provision of the Soldiers' and Sailors' Civil Relief Act every court in the land is empowered in all cases and required in certain cases to assign counsel to act in behalf of men absent in military service.").

[69] Other statutes explicitly call upon the person seeking counsel to initiate the appointment process by requesting that counsel be appointed. *E.g.*, 42 U.S.C. § 1971(f)(1982) ("the court . . . shall immediately, *upon his request*, assign to him such counsel") (emphasis added); 42 U.S.C. § 2000e-5(f)(1) (1982) ("*Upon application by the complainant* and in such circumstances as the court may deem just, the court may appoint an attorney") (emphasis added). *See* Hilliard v. Volcker, 659 F.2d 1125, 1128 (D.C.Cir. 1981) ("Title VII imposes a duty on the court to consider an appointment of counsel for a complainant but only upon his application.").

No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
(515) 472-5945

Counsel for Petitioner

January 27, 1989

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES: Page

No. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

JOHN E. MALLARD, Petitioner

v.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
et al., RESPONDENTS

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Petitioner John E. Mallard respectfully submits this reply brief in response to arguments first raised in the brief for the respondent United States District Court for the Southern District of Iowa

and the amicus brief submitted by the Association of the Bar of the City of New York.

ARGUMENT

I

THE COMMON MEANING OF THE WORD "REQUEST" IMPLIES THAT AN UNWILLING ATTORNEY MAY DECLINE A REPRESENTATION UNDER 28 U.S.C. SECTION 1915(d)

Respondent argues that the word "request" as used in Section 1915(d) is ambiguous because its dictionary definition includes as a potential meaning "the state of being sought after: DEMAND."[1]

---

[1]The definition cited by Respondent is the fourth potential definition for the noun "request." Webster's Ninth New Collegiate Dictionary (1985) at 1001. However, "request" is used as a verb in Section 1915(d) and the definition for the verb "request" is as follows: "1: To make a request to or of; 2: To ask as a favor or privilege; 3: obs: To ask (a person) to come or go to a thing or place; 4: To ask for." Id. at 1002. The Respondent notes that "request" may sometimes be given the same meaning as "require." This is true when the word "request" is used as a term of art such as, for example, in the case of a will, trust, or notice given to creditors in connection with a probate. See Abbott's Law Dictionary (1879), Volume II, p. 415; J. Frailey, Words & Phrases Judicially Defined (1905), Volume VII, pp. 6120-6122. In light of this particular use of "request" as a term of art, Black's Law Dictionary expanded the definition of "request" to include the meaning of a "direction or command in law of wills." Cf. Black's Law Dictionary (2d ed. 1910) at 1022 with Black's Law Dictionary (4th ed. 1968) at 1468.

But this analysis disregards the principle of statutory interpretation that words used in a statute are generally to be given their usual, plain, ordinary, and commonly understood meaning.[2]

The common meaning of the word "re-

---

[2]See Crane v. Commissioner of Internal Revenue, 331 U.S. 1, 6-7 (1947) (the word "property" as commonly used does not mean "equity"); Lynch v. Alworth-Stephens Co., 267 U.S. 364, 370 (1925) ("the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover").

quest" is "to ask."[3] Consequently, "request," as it is commonly used and as it appears in Section 1915(d), implies that an unwilling attorney may decline a representation. United States v. 30.64 Acres of Land, 795 F.2d 796, 800 (9th Cir. 1986).

Respondent asserts that the Eighth Circuit has been joined by other circuit courts in its interpretation of Section 1915(d), apparently because these courts have used the words "appoint" and "assign" interchangeably with the word "request". But the other courts did not construe Section 1915(d) in the context of determining whether this statute authorizes appointment of counsel to involuntary service. Petition for Certiorari, pp. 13-17. Consequently, it

---

[3]See note 1 supra.

is not the statutory language which is ambiguous but rather the words "appoint" and "assign" as used in the authorities upon which the respondent relies, including recent circuit court opinions,[4] a 1948 decision of this Court,[5] early

---

[4]The ambiguous use of the word "appoint" in McKeever v. Israel, 689 F.2d 1315 (7th Cir. 1982), apparently causes the respondent to question the position of the Seventh Circuit even though it is clearly expressed in Caruth v. Pinkney, 683 F.2d 1044, 1049 (7th Cir. 1982), cert. denied, 459 U.S. 1214 (1983) ("A court has the authority only to request an attorney to represent an indigent, not to require him to do so") (emphasis in original). Amicus New York City Bar also suffers from the confusion engendered by the use of the word "appoint" although it is difficult to understand why it is confused regarding the position of the Fifth Circuit in Ulmer v. Chancellor, 691 F.2d 209, 213 (5th Cir. 1982) ("[a] lawyer should not be conscripted into a Section 1983 case simply because he is a member of the bar, but this does not mean that all members of the bar should be denied the opportunity to assist the cause of justice under the authority of a court appointment").

[5]In Adkins v. E.I. DuPont De Nemours & Co., Inc., 335 U.S. 331 (1948), this

cases construing Section 1915(d),[6] and the Congresional Record.[7]

Court used the term "appoint" in the course of holding that the poor person's lawyers were not required to furnish affidavits of poverty. The lawyers in Adkins were retained without the exercise of any "appointment" power by the court. Id. at 333.

[6]Only one of those cases required a determination as to whether Section 1915(d) authorizes appointment of counsel to involuntary service, and that case supports the Petitioner's position herein. The court in Whelan v. Manhattan Ry. Co., 86 F. 219 (C.C.S.D.N.Y. 1898), considered the procedure to be used in making an "assignment" and recognized that the attorney who was already involved in the case on behalf of the poor person might choose to withdraw from the representation.

[7]The bill was described as "providing when plaintiff may sue as a poor person, and when counsel shall be assigned by the court." 23 CONG. REC. 5199 (1892) (see p. 7a infra). However, it should not be inferred from this description, as the Respondent submits, that "[t]o the drafters of the section, the words 'request' and 'assign' were interchangeable." Respondent's Brief, p. 12. There is nothing in the record to indicate that Mr. Culberson was the author of the bill he introduced. The Report of the House Committee on the Judiciary was submitted by Mr. Stockdale. H.R. REP. NO. 1079, 52d Cong., 1st Sess.

II

THE LEGISLATIVE HISTORY OF 28 U.S.C. SECTION 1915(d) DOES NOT SHOW THAT CONGRESS INTENDED TO REQUIRE ATTORNEYS TO PROVIDE COMPULSORY REPRESENTATION UPON REQUEST

According to the respondent's viewpoint, the legislative history of Section 1915(d) "suggests" that Congress intended to confer upon federal courts the power

---

(1892) (see p. 1a infra). In addition, even if Mr. Culberson had been associated with the drafting process, it is not reasonable to assume that while he was speaking on the floor of the House for the purpose of generally identifying the bill, he would have chosen his words as carefully as in drafting the bill. Furthermore, the label applied by Mr. Culberson was not even the official title of the bill. The referenced portion of the Congressional Record was entitled "OPENING UNITED STATES COURTS TO CERTAIN AMERICAN CITIZENS" and followed the official title of the Report of the House Judiciary Committee. Id. Finally, and most importantly, Congress did not pass the bill based upon its general description as extemporaneously uttered by Mr. Culberson. The legislators voted on the basis of the statutory language itself.

to compel attorneys to represent indigent civil litigants.[8] However, this theory is not supported by the scant[9] legislative history.[10] Consequently, the

---

[8]Assuming that this Court finds the meaning of the word "request" as used in Section 1915(d) to be clear and unambiguous, there is no need to examine the legislative history of this statute. When the language of a statute is plain and unambiguous, there is no occasion for construction, see Ex Parte Collett, 337 U.S. 55, 61 (1949), Lake County v. Rollins, 130 U.S. 662, 670-71 (1889), the statute must be given effect according to its plain and obvious meaning, see Hilton v. Sullivan, 334 U.S. 323, 335-36 (1948), and the court cannot indulge in speculation as to the probable or possible intentions of Congress, see Bruner v. U.S., 343 U.S. 112, 116 (1952).

[9]The legislative history consists of a Report by the House Judiciary Committee and an excerpt from the Congressional Record. These documents are retyped in the appendix hereto.

[10]Respondent relies heavily upon a statement that non-attorney court personnel could be compelled to "issue, serve all process, and perform all duties in such cases" without pay. 23 CONG. REC. 5199 (1892). But the statute evidences an intent to treat court personnel differ-

intention of the legislature is most properly ascertained primarily from the language of the statute itself. A. Magnano Co. v. Hamilton, 292 U.S. 40, 46-47 (1934). As noted above, the common meaning of the word "request" implies that an attorney may decline a representation.

A. The Purpose of Section 1915 Will Not Be Frustrated by Allowing an Unwilling Attorney To Decline a Request.

The concern prompting passage of the predecessor of Section 1915(d) was that access to the courts not be denied "for want of sufficient money or property to enter the courts under their rules."[11]

---

ently than attorneys. See note 12 infra.

[11]H.R. REP. NO. 1079, 52d Cong., 1st Sess. (1892) (pp. 1a-2a infra). As the House Committee on the Judiciary noted in its Report: "Will the Government allow its courts to be practically closed to its own citizens, who are conceded to

The problem for poor persons posed by court costs and fees was viewed separately from the problem of affording counsel. R. Smith, Justice and the Poor, at 20-32 (1919). In enacting Section 1915, Congress eliminated court costs and fees but left the issue of representation to the discretion of the court and the requested attorney. Thus, Congress was concerned with providing access to the courts, not with providing compelled, uncompensated representation to indigent persons.[12]

---

have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?" Id. (see pp. 5a-6a infra).

[12]It is instructive to note the difference in the language used in Sections 1915(c) and (d) which provide, in relevant part, as follows:

"(c) The officers of the court shall issue and serve all process, and perform all duties in such cases. Witnesses shall attend as in

Respondent argues that Section 1915(d) should not be construed to permit an attorney to decline a court request because this would render the statute ineffective or inefficient. But this argument assumes that Congress intended to assure representation to indigent civil litigants, and does not comport with the foregoing discussion of legislative purpose.

The lessened concern for providing counsel is evident not only from the use of the word "request" but also because the decision to seek counsel is left to the discretion of the court, unlike other

---

other cases. . . .

(d) The court may request an attorney to represent any such person unable to employ counsel. . . ." (Emphasis added).

laws requiring courts to appoint counsel.[13] In addition, Congress decided not to compensate lawyers for their work but would have done so if it had wanted to provide a more efficient and effective method for assuring representation of indigent civil litigants.[14]

---

[13] See, e.g., 18 U.S.C. Section 3006A(b); 25 U.S.C. Section 1912(b); 42 U.S.C. Section 1971(f).

[14] See, e.g., 18 U.S.C. Section 3006A(d); 28 U.S.C. Section 1912(b); see also the Legal Services Corporation Act, 42 U.S.C. Section 2996 et seq. As a further alternative, Congress might have provided that successful litigants would be awarded attorneys fees. See, e.g., 42 U.S.C. Section 1988. This type of provision creates an incentive for lawyers to investigate claims and determine the likelihood of success prior to bringing an action. This procedure serves a valuable purpose in eliminating less meritorious actions which would otherwise burden the courts. Congress expected actions under 42 U.S.C. Section 1983, such as the action in the underlying case of Mark Allen Traman et al. v. Steve Parkin, et al., to be brought by attorneys who would have the freedom to investigate the case and decide whether to offer their services as coun-

A failure to obtain counsel for an indigent civil litigant would not frustrate the primary purpose of Section 1915 because the poor person would still have access to the court and could represent himself.

Even assuming that Congress was especially concerned with providing counsel to indigent civil litigants, in view of the commitment of the bar to provide pro bono services, it is unlikely that the court would be unable to find an attorney who would be willing to volunteer his services. Merely because the first lawyer asked by the court chooses to

---

sel. Construing Section 1915(d) in the manner suggested by the petitioner, at least with respect to poor persons having Section 1983 claims, would afford those persons the opportunity for representation which Congress intended.

decline the representation, as in the instant case, does not demonstrate that another attorney who felt more comfortable with the task would not be willing to step forward.[15]

Respondent argues that authorizing a court to request but not compel an attorney to undertake a representation would render the statutory language superfluous since courts could have acted on their own to ask lawyers to provide

---

[15]In connection with the consideration of the availability of counsel, it has been suggested that courts should encourage the use of retained counsel more strongly because this provides a market test of the merits of the poor person's claims, and might also aid the courts in determining whether the claims justify the court seeking counsel under Section 1915(d). McKeever v. Israel, 689 F.2d 1315, 1325 (7th Cir. 1982) (Posner, J. dissenting).

representation.[16] However, one must consider the historical context in which Section 1915(d) was enacted. Courts of the day did not concern themselves with the rights of poor persons since the poor, by definition, were not even able to obtain access to the courts. Consequently, it is not unreasonable to assume that Congress enacted Section 1915(d) to encourage courts to utilize the pro bono

---

[16]The principle that statutory language should be given an interpretation which does not render that language superfluous, see South Carolina v. Catawba Indian Tribe, 476 U.S. 498, 510 n.22 (1986), has questionable validity where the statute being examined contains other language which is clearly superfluous. The balance of Section 1915(d) which authorizes the court to dismiss the case "if satisfied that the action is frivolous or malicious" is clearly superfluous based upon the inherent power of the court to dismiss such actions. See Brinkley v. Louisville & N. R. Co., 95 F. 345, 348 (C.C.W.D.Tenn. 1899).

services of attorneys in favor of poor persons.

B. The Word "Request" in Section 1915(d) Was Selected Deliberately and There Were Rational Bases for Selecting This Word

1. Congress Used the Word "Request" in Section 1915(d) in Place of the Word "Appoint" or "Assign" Which Appeared in Existing Statutes

Congress was motivated to enact Section 1915 by the fact that "many humane and enlightened States have such a law." H.R. REP. NO. 1079, 52d Cong., 1st Sess. (1892) (<u>see</u> p. 6a <u>infra</u>). Eleven states had such laws as of the time of the enactment of Section 1915(d) and these state laws were presumably inspired by the statute of 11 Henry VII, c. 12

(1495).[17] It is significant to note that all of these statutes, in describing the power of the court to provide counsel for poor persons, used the words "assign" or "appoint."[18] It is presumed that the

---

[17]<u>See</u> Fisch, "Coercive Appointments of Counsel <u>In Forma Pauperis</u>: An Easy Case Makes Hard Law," 50 Mo. L. Rev. 527, 543-47 (1985).

[18]<u>See</u> 11 Hen. VII, c.12 (1495) (assign counsel and appoint attorneys); Illinois Revised Statutes Chapter 33, Section 5 (1889) (assign); Indiana Laws, Civil Code Section 17 (1881) (assign); Kentucky General Statutes Chapter 26, Section 1 (1873) (assign); Missouri Revised Statutes Chapter 43, Section 2918 (1889) (assign). The Laws of the State of New York, Article Third, Section 460 (1876) (assign); North Carolina Public Laws, Chapter 96, Section 2 (1868-69) (assign); Tennessee Code Chapter 4, Section 3980 (1858) (appoint); Sayles Texas Civil Statutes, Title 27, Chapter 3, Article 1125 (1889) (appoint); Code of Virginia, Title 49, Chapter 173, Section 3538 (1887) (assign); Acts of the Legislature of West Virginia Chapter 146, Section 1 (1882) (assign). Petitioner was not able to obtain access to the law of Arkansas as of 1892 but the successor to that law, Arkansas Statutes Annotated Section 27-403 (1947), provided, prior to

legislature understood the meaning of the words used and that it intended to use them. U.S. v. Goldenberg, 168 U.S. 95, ___ (1897). Moreover, where the words or provisions of a statute differ from those of a previous statute on the same subject, they are presumably intended to have a different construction or meaning, and to denote an intention to change the law. U.S. v. Stroop, 109 F.2d 891, 893-94 (6th Cir. 1940); Taft v. Commissioner of Internal Revenue, 92 F.2d 667, 669 (6th Cir.) affirmed 304 U.S. 351 (1937). Consequently, the fact that Congress chose to substitute the word "request" for the words "assign" or "appoint" used in all other similar statutes of the day indicates that Congress intended to

---

its repeal in 1985, that "The court . . . may assign him counsel."

select a different meaning and that its selection was deliberate.

2. At the Time of the Enactment of Section 1915(d), English Attorneys Were Permitted To Decline an Indigent Person's Request for Representation

Respondent assumes in its historical analysis that Section 1915(d) was adopted directly from the statute of 11 Henry VII, c. 12 (1495) and that its references to "assign" and "appoint" were consequently the meanings intended to be given to the word "request" in Section 1915(d). As discussed above, it is fair to assume that Section 1915 was motivated by state statutes similar to the statute of 11 Henry VII, but it is not fair to assume that Congress intended to adopt the same method for providing attorneys to indigent civil litigants, since the drafters of Section 1915(d) deliberately replaced

the references to "assign" or "appoint" with "request." Under such circumstances, the change in terminology is presumably intended to have a different construction or meaning and to denote an intention to change the law. U.S. v. Stroop, 109 F.2d 891, 893-94 (6th Cir. 1940).

The use of the word "request" demonstrates not only an intention to depart from the statute of 11 Henry VII, but also comports with the practice which was in effect in England at the time of the adoption of Section 1915(d). The statute of 11 Henry VII was in effect for almost four centuries from 1495 until 1883 when it was repealed and replaced by the Statute Law and Civil Procedure Act. R. Smith, Justice and the Poor, at 21-22 (1919). In light of the longevity of the

statute of 11 Henry VII and the fact that England had abandoned it, it is not reasonable to assume that Congress would have decided to adopt an act which had been determined to be inadequate. It is more likely that Congress would have considered the current procedure in England.

As of 1892, the practice for obtaining an attorney for a poor person in England consisted of the poor person finding a solicitor and counsel and requesting their services, and this request could be declined. The procedure has been described as follows:

> "The would-be pauper plaintiff has first to find a solicitor who will write out his case and prepare his affidavit, and a counsel who will undertake it right through the courts without the chance of getting any remuneration--unless they seek to charge him preliminary fees, which he often is unable to pay. A judge

> has power to assign a solicitor and counsel to the applicant and will usually choose those who have backed his application. . . It is understood that in England several of the judges and the council of the Law Society favor a reform of the present Rules as to proceedings by or against poor persons . . . but the representatives of the Bar are opposed to the scheme. The proposed new Rules have not been published; but from the Memorandum of the Bar Council setting forth their views, it appears that their main objections are: (1) the imposition of a heavy burden on the Bar. . . ." Bentwick: Legal Aid for the Poor, 47 Law Journal (1912) 48.

It appears from the above article that the Bar of England, after centuries of experience under the statute of 11 Henry VII, Chap. 12, was reluctant to allow attorneys to once again be appointed without pay.[19] Similar sentiments likely existed in 1892, nine years after the repeal of the statute of 11 Henry VII.

---

[19]The ABA, at its August, 1988 Annual Meeting took a similar position and passed a resolution "recommend[ing] that all jurisdictions provide by statute or rule of court that attorneys appointed to

Assuming that Congress was aware of the circumstances in England at the time of its enactment of Section 1915(d), cf. Prudential Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946), it is probable that Congress would have viewed the change in English law with favor and would have adopted the new procedure which involved the making of a request.

3. At the Time of the Enactment of Section 1915(d), the Highest Courts of Several States Had Held That Attorneys Appointed To Represent Indigents Were Constitutionally Entitled To Compensation

As of the time of the consideration of the bill by Congress in 1892, the highest courts of three states had held that attorneys appointed to represent indigents were constitutionally entitled to

---

represent persons who have a constitutional or statutory right to counsel receive reasonable compensation and full reimbursement for costs and expenses." ABA Resolution, Annual Meeting Report No. 10E (1988).

compensation. See Hall v. Washington Co., 2 Greene 473 (Iowa 1850); Webb v. Baird, 6 Ind. 13 (1854); County of Dane v. Smith, 13 Wis. 654 (1861). While the highest courts of other states had denied claims of appointed counsel for nonstatutory just compensation, see United States v. Dillon, 346 F.2d 633, 637 App. (9th Cir.) cert. denied, 382 U.S. 978 (1965), there was no clear tradition of the bar that unwilling attorneys could be compelled to represent indigent persons without compensation, see Shapiro, The Enigma of the Lawyer's Duty to Serve, 55 N.Y.U.L.Rev. 735, 753 (1980). It must be presumed that Congress knew of the existence of the various court decisions at the time it was considering the enactment of Section 1915(d) which encompassed similar subject matter. See Prudential

Ins. Co. v. Benjamin, 328 U.S. 408, 430 (1946). In view of the state court holdings, and the manifest concern of Congress for the expenses which would be occasioned by Section 1915,[20] it appears that Congress may have intended to avoid any possibility of incurring significant expenses to attorneys, in connection with their representation of indigent civil litigants, by using the word "request" and seeking only attorneys who were will-

---

[20]The legislative history includes statements to the effect that poor persons would not be permitted to enter the courts without money unless they first filed a statement under oath of their poverty and their inability to pay the costs of suit or give security therefor, and that the action was being commenced in good faith. "And to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him." H.R. REP. NO. 1079, 52d Cong. 1st Sess. (1892) (see p. 5a infra).

ing to act as pro bono volunteers on a gratuitous basis.

III

MANDAMUS IS THE PROPER REMEDY TO CORRECT A JUDICIAL USURPATION OF POWER IN THE FORM OF A MANDATORY APPOINTMENT OF COUNSEL THAT IS NOT AUTHORIZED BY 28 U.S.C. SECTION 1915(d)

Respondent argues that the Eighth Circuit was correct in denying petitioner's application for a writ of mandamus because the district court acted within its discretion in appointing the petitioner. But the question presented herein is not whether the district court abused its discretion in appointing the petitioner over his objection that he is not competent. The question presented is whether the district court was empowered by Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel thereunder.

If there was no legal basis for the respondent to require the petitioner to accept the requested representation, then

> "use of the writ of mandamus in this case would come squarely within its 'traditional use confin[ing] an inferior court to a lawful exercise of its prescribed jurisdiction' Roche v. Evaporated Milk Association, 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943), for respondent's action would fall into the category of 'usurpation of power' against which mandamus is classically available. DeBeers Consol. Mines, Ltd. v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 89 L.Ed. 1566 (1945)." Estelle v. Justice, 426 U.S. 925, 929-30 (1976) (Rehnquist, J. dissenting).

Assuming that the arguments in this case demonstrate that the district court has no power under Section 1915(d) to require the petitioner to undertake a representation, then the district court would have usurped its power and jurisdiction in requiring the petitioner to so serve, and mandamus would be the proper remedy.

This case does not suffer from any of the common defects which lead to a denial of a writ of mandamus. The order of the district court was not otherwise appealable and an application for a writ of mandamus from the Eighth Circuit was "the only means of forestalling [the] intrusion by the federal judiciary". Will v. United States, 389 U.S. 90, 95 (1967). In addition, the order of the district court, if not corrected by mandamus, would have adverse effects on the petitioner by requiring him to represent the plaintiffs in the case of Mark Allen Traman, et al. v. Steve Parkin, et al., without any other opportunity to dismiss his wrongful appointment. Cf. De Beers Consol. Mines Ltd. v. U.S., 325 U.S. 212 (1949) (mandamus was a proper remedy to correct an unusual preliminary order, not

appealable in itself and found to be outside the power and jurisdiction of the lower court, which would cause injury which could not subsequently be redressed). Finally, if the district court has improperly exercised its authority to conscript petitioner, the prospect that this improper exercise of authority may be repeated makes mandamus particularly appropriate. Estelle, 426 U.S. at 930, citing La Buy v. Howes Leather Co., 352 U.S. 249 (1957).

IV

THE CIRCUIT COURT'S DENIAL OF THE APPLICATION FOR A WRIT OF MANDAMUS CANNOT BE JUSTIFIED BASED UPON THE INHERENT AUTHORITY OF THE DISTRICT COURT

A. The District Court Relied Upon Section 1915(d) In Holding That It Was Empowered To "Appoint" and the Inherent Authority of the Court Is Not Relevant To a Determination of the Propriety of Mandamus

In ruling on the petitioner's motion to dismiss his appointment, the district court framed the issue broadly stating that "attorney Mallard argues . . . that the court lacks power to appoint him to represent an indigent civil litigant." Pet. App. p.2a. However, notwithstanding the broad nature of the issue addressed by the district court, the district court limited its holding to a finding that it was authorized to make the appointment based upon Section 1915(d), citing Coburn v. Nix, Civ. No. 86-716-B (S.D.Iowa June 16, 1987).[21] Pet. App. p.3a.

Consequently, in light of the history

---

[21]In Coburn, the district court again framed the issue broadly as to whether the court has the power to compel an attorney to serve as counsel. See Opp. Pet. p.1a. Again, the district court's holding was based solely upon its construction of Section 1915(d). Opp. App. pp.4a-5a.

of this case, it cannot be contended that the district court relied upon some inherent authority to justify its appointment of the petitioner to serve as counsel. Even if the district court thought that it had inherent authority, such authority would have been discretionary and non-reviewable and the court may have decided not to appoint counsel.[22]

---

[22]The discretionary authority of the court to request counsel under Section 1915(d) has been greatly circumscribed such that, in the event a prima facie case is set out by the poor person seeking counsel, any refusal to provide counsel would be an abuse of discretion. See McKeever v. Israel, 689 F.2d 1315, 1320 (7th Cir. 1982) (divided court held that "failure of the district court to exercise its discretion under Section 1915(d) to seek counsel was an abuse of discretion", with Posner, J. dissenting on the ground that the discretion of the district court was being constrained). As noted in the statement of the case, the procedure for the appointment of attorneys under Section 1915(d) was established at the direction of the Eighth Circuit, and it was in response to this directive that the district court pre-

Finally, the petitioner was required to rely upon the order of the district court in seeking a writ of mandamus from the Eighth Circuit and in bringing this case. It is wholly outside of the question presented herein to consider whether courts have an inherent authority to appoint counsel for indigent civil litigants. See Supreme Court Rule 34.1(a).[23]

B. The District Court Has No Inherent Authority To Make Mandatory Appointments of Counsel for Civil Litigants

1. There Is No Constitutional Provision From Which the Court Might Derive Inherent Authority to Appoint Counsel for Civil Litigants

Amicus New York City Bar cites numerous cases for the proposition that courts are authorized to appoint attorneys to render service to indigent persons. However, it is notable that these cases involve criminal proceedings. See, e.g., Powell v. Alabama, 287 U.S. 45 (1932); United States v. Dillon, 346 F.2d 633 (9th Cir. 1965), cert. denied, 382 U.S. 978 (1966).

Courts derive inherent authority from the Constitution which acknowledges the judiciary as a separate branch of government and empowers it to insure that constitutional provisions relating to

---

pared a list of attorneys and appointed the petitioner. Consequently, it is not possible to know whether the district court would have attempted to exercise some extraordinary inherent authority to appoint the petitioner in the event its actions would not be reviewable by the Eighth Circuit.

[23]A refusal by this Court to examine this new issue would in no way prejudice the district court in its future actions and the district court might subsequently seek to again "appoint" the petitioner to service on the basis of some inherent authority if it determines that it is empowered to do so and exercises its discretion to do so.

judicial actions are given effect. In this regard, the Sixth Amendment provides, in relevant part, that "[In] all criminal prosecutions the accused shall . . . have the assistance of counsel for his defense." U.S. Const. amend. VI. Based upon this directive, it is reasonable to assume that a court might make a mandatory appointment of counsel to insure the representation of an indigent criminal defendant, at least under those circumstances where the client is so unpopular that no attorney is willing to take on the representation.[24] See Powell

[24]A mandatory appointment of counsel under such limited circumstances fulfills a compelling interest of the defendant to have access to counsel and a compelling interest of our government, as expressed in the Constitution, to provide counsel as a key ingredient of our system of justice. However, the mandatory appointment does not foreclose the right of the attorney who is appointed to demonstrate that he may likewise have a compelling

v. Alabama, 287 U.S. 45 (1932). However, there is no similar directive in the Constitution which gives courts an inherent power to make a mandatory appointment of counsel for indigent civil litigants.

2. The Authority of the Court To Regulate the Proceedings Pending Before It Does Not Empower It To Require An Unwilling Attorney To Become Involved in a Certain Proceeding

Amicus New York City Bar cites numerous cases for the proposition that courts have inherent authority to appoint counsel in connection with their activities in administering justice.[25]

interest not to be the attorney who is required to represent the criminal defendant.

[25]Amicus New York City Bar also identifies Rule 83 of the Federal Rules of Civil Procedure and 28 U.S.C. Section 2071 as provisions granting the court additional powers. However, these provisions are so general in recognizing the

But the cases cited demonstrate only that the court has the power to insure that all parties who appear before it, including attorneys as the representatives of any parties appearing in cases before it, abide by such rules as the court may prescribe for the purpose of insuring that the proceedings are fair. However, it should not be presumed based upon this circumstance, that courts have the power to also compel attorneys admitted to the bar to become involved in a particular civil proceeding as part of the exercise of the court's authority to regulate that proceeding.

---

right of the court to prescribe rules to regulate its practice, that they do not appear to expand in any appreciable manner the inherent authority of the court.

The petitioner acknowledges that the court has inherent authority to regulate the conduct of the bar to the extent necessary to insure that its members are competent and ethically and professionally responsible. But there is nothing implicit in the court's authority to regulate these matters which would empower the court to make a mandatory appointment of counsel for a civil litigant.

3. The Court Does Not Derive Any Inherent Authority To Appoint Counsel for Civil Litigants Based Upon the Rules of Professional Responsibility or an Atorney's Obligations Thereunder

Respondent and Amicus New York City Bar argue that the Iowa Code of Professional Responsibility for Lawyers creates an obligation of petitioner to represent the disadvantaged and provide free legal

services. Iowa Code of Professional Responsibility for Lawyers, EC 2-27. However, there are three problems with this statement as it relates to the instant case. First, this statement begs the question regarding how the court derives its authority to make the initial appointment. Without considering this first issue, the court could make numerous, frequent, and unreasonable appointments without any need to justify its action, and attempt to shift the burden to the attorney who has been appointed to demonstrate a compelling reason why that appointment should be dismissed.

Secondly, it is in no way clear that the petitioner is ethically obligated to accept the appointment in view of the petitioner's background and claims of incompetence. Even though the district

court has held that the petitioner is competent, it has never been determined as a matter of professional responsibility that the petitioner's application of a higher standard of competence is unethical. In fact, viewed from the other direction, the district court's finding of "competence" would in no way be binding upon the parties who the petitioner would be forced to represent and who might later sue the petitioner for malpractice. Ferri v. Ackerman, 444 U.S. 193 (1979).

Thirdly and finally, the proceedings below in no way amount to a disciplinary proceeding as to whether the petitioner has complied with the Iowa Code of Professional Responsibility for Lawyers. Certainly the holding in Hall v. Washington Co., 2 Greene 473 (Iowa 1850),

which might properly be considered part of the lore of the profession for Iowa attorneys, suggests that a lawyer could refuse a court appointment solely on the ground that there was no provision for compensation. In addition, if the petitioner was to be subjected to a disciplinary proceeding, it would be before an appropriate board, with a hearing that would insure procedural due process and allow for a consideration of many facts not appearing in the record below which might demonstrate a compelling reason for declining an appointment, such as in the event the assigned representation would create financial hardship. See Family Division of Trial Lawyers v. Moultrie, 725 F.2d 695, 705 (D.C.Cir. 1984) ("An unreasonable amount of required uncompensated service might qualify").

V

CONSTITUTIONAL ARGUMENTS

A. Freedom of Speech

The Respondent implies that the petitioner's expressed dislike for litigation is unexplained and suspect. This Court has noted in Sherbert v. Verner, 374 U.S. 398 (1963) that a court might inquire into whether there is (i) a sincere belief in the importance of the First Amendment freedom which is being infringed or (ii) an insincere and fraudulent claim based upon malingering or deceit. Id., 374 U.S. at 407. While the record may not be as comprehensive as the respondent would like, there is nothing in the record to indicate that the petitioner's expressed feelings are insincere. In addition, to the extent that the respondent had any concern for the

intensity and nature of the petitioner's dislike for "confrontational and accusatory speech," it might have scheduled a hearing to cross-examine the petitioner on the statements in his affidavit. Because the district court did not do so, it is reasonable to assume that the court accepted the truth of the statements made by the petitioner at the time of his motion to dismiss the appointment but disregarded them as irrelevant to the relief requested. Cf. Townsend v. Rice, Civ. No. 84-655-A (S.D.Iowa February 10, 1987) (reprinted at Respondent's Brief App. 6) (the magistrate scheduled a hearing on a motion for permission to withdraw from an appointment for the purpose of making further inquiry).

B. Due Process and Equal Protection

Respondent acknowledges that certain

attorneys are exempted from receiving federal court assignments by reason of their participation in other pro bono work through the Volunteer Lawyers Project. The Respondent also acknowledges that attorneys who engage in pro bono work other than through the Project might also be considered for exemptions from service under the federal program. However, the Respondent fails to distinguish the unequal treatment accorded to the petitioner as compared with the exemption provided to the attorney in Townsend v. Rice, Civ. No. 84-655-A (S.D.Iowa February 10, 1987) (reprinted at Respondent's Brief App. 6). In Townsend, the court accepted the attorney's offer to provide pro bono services in the future and allowed that he could do so without being required to

act as a trial attorney. Id. The offer made by the attorney in Townsend is practically indistinguishable from the offer made by the petitioner "to volunteer [his] services for other volunteer lawyers projects with the Legal Services Program, in lieu of participating in the federal pro bono referral program for which [he was] not qualified" (J.A. 8). However, the petitioner was not granted a hearing or accorded an exemption.

C. Taking Private Property For Public Use Without Compensation

In addition to the authorities heretofore cited by petitioner for the proposition that an attorney's services constitute "private property," the petitioner adopts the reasoning and authorities set forth in Brief Point II by amicus State Bar of California.

CONCLUSION

For these various reasons, the arguments made by the respondent and the amicus New York City Bar are not persuasive and 28 U.S.C. Section 1915(d) should be construed as authorizing the District Court only to request a pro bono volunteer to undertake the representation of indigent civil litigants. The judgment of the Court of Appeals should be reversed and a writ of mandamus should be issued directing the District Court to grant the petitioner's motion to dismiss his appointment.

Respectfully submitted,

John E. Mallard
107 South Main Street
Fairfield, Iowa 52556
Counsel for Petitioner

APPENDIX

52D CONGRESS,} HOUSE OF { REPORT
1st Session.} REPRESENTATIVES {No. 1079.

OPENING UNITED STATES COURTS TO CERTAIN AMERICAN CITIZENS.

APRIL 14, 1892--Referred to the House Calendar and ordered to be printed.

MR. STOCKDALE, from the Committee on the Judiciary submitted the following

REPORT:

[To accompany H. R. 8153.]

The Committee on the Judiciary, to whom was referred House bill 583, having considered the same, respectfully submit the following:

This bill proposes to open the United States courts to a class of American citizens who have rights to be adjudicated, but are now excluded practically for want of sufficient money or property to enter the courts under

their rules.

The United States circuit and district courts were established in part, if not mainly, to furnish in each State an impartial tribunal in which other States and citizens of other States can try their causes free from the effects of local influences that might bias State tribunals.

The argument that people who can not pay or secure costs will seldom litigate about property worth over $2,000 only goes to show that but little expense will accrue to the Government by the passage into law of this bill, and does not affect its justice or the need of it. People may have claims to property by inheritance or devise, or by purchase, worth over $2,000, and it may be their only possessions, and they can not use it

to secure bondsmen or money to meet the demands for costs by reason of the fact that it is in dispute. These persons with honest claims may be defeated, and doubtless often are, by wealthy adversaries.

Corporations may destroy the head of a family, and his heirs who would have a right of action for support will be deprived of justice by the demand for costs.

It is no answer to say that they can sue in State courts, for the defendant can remove the cause to the United States court. And besides, some States do not have such a law. Others who have construed it to apply to their own citizens and not to nonresidents.

And if these people are not allowed in the United States courts, why admit the

wealthy, who can take care of themselves in the State courts better than the poor.

In short, this bill presents the question whether this Government, having established courts to do justice to litigants, will admit the wealthy and deny the poor entrance to them to have their rights adjudicated.

The proposed law will not admit of vexatious litigation. It is well guarded. In order to get the privilege of the courts which litigants with money can demand without question and compel the court to hear their cases, anyone of these people who desires to enter the courts without money must first file in the court a statement under oath that because of his poverty he is unable to pay the costs of said suit or action or to give security for the same. He must

also state that he believes he is entitled to the redress asked, and must set out the nature of his alleged cause of action.

The court may dismiss the suit at any time if it be made to appear that the allegation of poverty is probably untrue, or if he be satisfied that the alleged cause of action is frivolous or malicious.

And to avoid possibility of imposition judgment may be rendered for costs as in other cases, so that if the party succeed in the suit, or failing should afterwards acquire property, the costs may be made out of him.

The question is narrowed therefore to this: Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have

valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice? Even then they will not have an equal chance with other men, for men able to prosecute gain cases that would be dismissed by the court had it the power. Many humane and enlightened States have such a law, and the United States Government ought to keep pace with this enlightened judgment.

The Government will not determine questions involving the liberty of the citizen without furnishing him his witnesses on his demand. Property is next in importance, and the less a man has the more important it is to him, and the more reprehensible to deprive of it unjustly.

The committee recommend the passage of the substitute.

OPENING UNITED STATES COURTS TO CERTAIN AMERICAN CITIZENS.

MR. CULBERSON. Mr. Speaker, I now call up the bill (H. R. 8153) providing when plaintiff may sue as a poor person, and when counsel shall be assigned by the court.

The bill was read, as follows:

Be it enacted, etc., That any citizen of the United States, entitled to commence any suit or action in any court of the United States, may commence and prosecute to conclusion any such suit or action without being required to prepay fees or costs, or give security therefor before or after bringing suit or action, upon filing in said court a statement under oath in writing that because of his poverty he is unable to pay the costs of said suit or action which he is about to commence, or to give security for the same, and that he believes he is entitled to the redress he seeks by such suit or action, and setting forth briefly the nature of his alleged cause of action.

SEC. 2. That after any such suit or action shall have been brought, or that

is now pending, the plaintiff may answer and avoid a demand for fees or security for costs by filing a like affidavit.

SEC. 3. That the officers of court shall issue, serve all process, and perform all duties in such cases, and witnesses shall attend as in other cases, and the plaintiff shall have the same remedies as are provided by law in other cases.

SEC. 4. That the court may request any attorney of the court to represent such poor person, if he deems the cause worthy of a trial, and may dismiss any such cause so brought under this act if it be made to appear that the allegation of poverty is probably untrue, or if he be satisfied that the alleged cause of action is frivolous or malicious.

SEC. 5. That judgment may be rendered for costs at the conclusion of the suit as in other cases.

Mr. CULBERSON. Mr. Speaker, the effect of this bill, if it should become law, will be to open the courts of the United States to a class of persons who are now denied the right of bringing suits in the courts of the United States, that have no money or property by which to comply with the rules of the courts in

respect to costs. This bill provides that any individual in this class who files an affidavit that he is not able to pay the money that is required to be deposited, or to give security for the costs, he may proceed in forma pauperis, and at the end of the suit a judgment for costs is issued as in other cases. If the plaintiff fails the judgment is rendered against him for the costs, and if defendant fails the judgment is given against him for the costs.

Mr. WILLIAM A. STONE. Will the gentleman yield to me for a question?

Mr. CULBERSON. Certainly.

Mr. WILLIAM A. STONE. In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for the costs, how do the officers get their pay?

Mr. CULBERSON. They do not get any in that event.

Mr. WILLIAM A. STONE. Then you are simply compelling the officers to do that work for nothing.

Mr. CULBERSON. We are simply in these cases of charity and humanity compelling these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.

Mr. WILLIAM A. STONE. As I understand, the question as to whether the plaintiff is able or unable to pay the costs is wholly determined by himself.

Mr. CULBERSON. No, sir; not at all.

Mr. LIVINGSTON. This is the same as the law in the State courts.

Mr. WILLIAM A. STONE. In my State they have to pay the costs. I suppose there are States where that is not the case.

Mr. O'NEILL of Missouri. A great many of them.

Mr. CULBERSON. Mr. Speaker, I yield to the gentleman from Pennsylvania to offer an amendment.

Mr. CHARLES W. STONE. Mr. Speaker, I move to amend, first, by inserting at the end of the second section the following words:

> And willful false swearing to any affidavit provided for in this or the previous section shall be punishable as perjury is in other cases.

Mr. CULBERSON. I will accept that.

Mr. CHARLES W. STONE. I also offer another amendment, which is a clerical one, that the word "he," in the second

line of section 4, which as it stands might refer to the poor person, be stricken out and the word "it," referring to the court, be substituted; and that the word "he," in the fourth section, line 5, be stricken out and the words "said court" inserted in place thereof.

Mr. CULBERSON. These are very proper amendments, and I hope they will be adopted. I ask for a vote upon the amendments.

The question was taken, and the amendments were severally agreed to.

Mr. LANHAM. I would like to ask my colleague if he has any objection to striking out the word "probably," in the fifth line of section 4?

Mr. CULBERSON. I have no objection. I think that it would make the section better.

Mr. LANHAM. Then I move to strike out the word "probably," in line 5 of section 4.

The amendment was agreed to.

Mr. JOSEPH D. TAYLOR. I wish to suggest to the gentleman from Texas whether it would not be better to amend the bill so that the plaintiff shall make it appear to the satisfaction of the judge, by affidavit or otherwise, that he is unable to give bond for the costs, and that this proceeding shall be before the order, instead of providing for punishment at the end?

Mr. CULBERSON. If the gentleman will examine section 4 he will see that his idea is there carried out.

Mr. Speaker, I am under obligations to a gentleman who is not present in the House to offer an amendment, which will

not alter the main provisions, and which I think is unnecessary, but which I now offer. At the end of section 5 to insert the words:

Provided, That the United States shall not be liable for any of the costs thus incurred.

I ask that this amendment be adopted.

The amendment was reported by the Clerk.

The amendment was agreed to.

Mr. CULBERSON. I demand the previous question on the engrossment and third reading of the bill as amended.

The previous question was ordered.

The SPEAKER pro tempore. If there be no objection the amendments will be voted upon in gross.

There being no objection, the amendments were adopted.

The bill was ordered to be engrossed

and read a third time; and being engrossed, it was accordingly read the third time, and passed.

Mr. CULBERSON moved to reconsider the vote by which the bill was passed; and also moved that the motion to reconsider be laid on the table.

The latter motion was agreed to.

No. 87-1490

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

JOHN E. MALLARD,
Petitioner,
v.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR STATE BAR OF CALIFORNIA AS *AMICUS CURIAE*

DIANE C. YU*
STATE BAR OF CALIFORNIA
555 Franklin
San Francisco, California 94102
Telephone: (415) 561-8200

JACK W. LONDEN
MORRISON & FOERSTER
345 California Street
San Francisco, California 94104-2675
Telephone: (415) 434-7415

* *Denotes Counsel of Record*

QUESTION PRESENTED

Does 28 U.S.C. section 1915(d) give a federal district court the power to compel an attorney to provide uncompensated services to those litigants proceeding *in forma pauperis*?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Statutes

Other Authorities

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988

No. 87-1490

JOHN E. MALLARD,
Petitioner,
v.
UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, *ET AL.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF FOR STATE BAR OF CALIFORNIA AS *AMICUS CURIAE*

INTEREST OF THE *AMICUS CURIAE*[1]

The State Bar of California submits this brief to present the Court with important information both about the potential impact

---

1 Consent to the filing of this brief has been obtained from the parties to this action, and copies of their written consents have been lodged with the Clerk of the Court.

of this litigation on the members of the State Bar, and about the possible harm the decision of the lower courts in this case may work upon the public policy of meaningful access to the judicial system.

The State Bar of California has unceasingly participated in programs and activities to assist members of the judiciary and bar improve and maintain their professional responsibilities and ethical obligations, and to assist the courts in the maintenance and improvement of the judicial system, and has actively encouraged its members to accept court appointments and to volunteer to perform work *pro bono publico*. Moreover, the State Bar has become a national leader in the area of *pro bono publico* representation through its development of programs such as the Volunteer Legal Services Program. However, the bar has also recognized that it is not always financially feasible for any given attorney to render uncompensated legal services in potentially large and complex cases and that insufficient financial means may often significantly affect the competence of representation.

The principal issues to be resolved in this case concern powers and duties of the bench and bar with regard to appointment and compensation of counsel for indigent civil litigants proceeding *in forma pauperis* pursuant to 28 U.S.C. section 1915.

In view of its familiarity with these issues and because the ultimate determination of these issues will affect the administration of justice in California, the State Bar strongly urges that the Court carefully consider the effect that involuntary uncompensated services inevitably will have upon the quality of representation made available to the indigent.

SUMMARY OF ARGUMENT

Amicus, the State Bar of California, is aware that the issue presented in this case could be resolved by resort to the language of Title 28 U.S.C. section 1915(d).[2] Similarly, a decision could

---

[2] The words of a statute are to be given their ordinary, contemporary meaning. *See, e.g., Caminetti v. United States*, 242 U.S. 470 (1917); *Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979). Section 1915(d) states that the courts may "request" an attorney to represent an indigent party. "Request" is generally defined as "to ask to do something." If Congress had intended to give courts the power to require attorneys to represent indigents without compensation rather than merely giving them the authority to request representation, it would have used "require" instead of "request."

Many courts, including the Ninth Circuit, have explicitly recognized the clear distinction between "require" and "request" in their interpretations of section 1915(d). *See United States v. 30.64 Acres of Land, More or Less, Situated in Klickitat County, State of Washington*, 795 F.2d 796, 801 (9th Cir. 1986) (court examined at length issue of the meaning of "request" as used in section 1915(d) and concluded that it did not authorize appointment of counsel to involuntary uncompensated service); *United States v. Leser*, 233 F. Supp. 535, 538 (S.D. Cal. 1964), *cert. denied*, 379 U.S. 983, *reh'g denied*, 380 U.S. 928 (1965) (lack of power to compel service under section 1915(d) "is implicitly recognized . . . inasmuch as that Section does not give the Court the power to . . . compel . . . an attorney to represent anyone, but merely gives the Court the power to *request* an attorney to do so") (emphasis in original); *Reid v. Charney*, 235 F.2d 47 (6th Cir. 1956); *Rhodes v. Houston*, 258 F. Supp. 546, 579 (D. Neb. 1966), *aff'd*, 418 F.2d 1309 (8th Cir. 1969), *cert. denied*, 397 U.S. 1049 (1970); *but see Peterson v. Nadler*, 452 F.2d 754 (8th Cir. 1971) (holding court had power to appoint counsel under section 1915(d) and expressing confidence that lawyers will cooperate); *Tyler v. Lark*, 472 F.2d 1077 (8th Cir.), *cert. denied*, 414 U.S. 864 (1973).

be reached by resort to the history and intent of section 1915(d).[3]

However, should the Court find it necessary to resort to extrinsic aids in order to interpret the language of section 1915(d), the State Bar of California submits that meaningful access to the judicial system for the indigent — the public policy that prompted passage of section 1915(d) — cannot be served by allowing courts to compel unwilling attorneys to render uncompensated services to the indigent on a basis that is fraught with conflict of interest and the likelihood of incompetent representation. Moreover, we contend that the interpretation of section 1915(d) urged by the District Court of Iowa contains serious Constitutional infirmities, including a clear and direct violation of the Fifth Amendment prohibition against the taking of property without just compensation.

---

3 Title 28, U.S.C. section 1915 was first enacted in 1892 as Chap. 209, 27 Stat. 252 and, in pertinent part, read "that the court may request any attorney of the court to represent such poor person . . . ." The concern prompting passage of this bill was that access to the courts not be denied "for want of sufficient money or property to enter the courts under their rules." As Congress put it: "Will the Government allow its courts to be practically closed to its own citizens, who are conceded to have valid and just rights, because they happen to be without the money to advance pay to the tribunals of justice?" *52d Congress, 1st Session, House of Representatives, Report No. 1079, April 14, 1892.* The concern of Congress was thus with not barring access to those who lacked the money to pay court costs, and was not with providing compelled, uncompensated representation to the indigent, although a provision did allow the court to request an attorney to provide gratuitous representation.

ARGUMENT

I. THE PUBLIC POLICY SUPPORTING MEANINGFUL ACCESS TO THE COURTS FOR INDIGENT LITIGANTS WOULD BE ILL-SERVED BY THE INVOLUNTARY AND UNCOMPENSATED APPOINTMENT OF COUNSEL PURSUANT TO 28 U.S.C. SECTION 1915(d), FOR SUCH COUNSEL, BEARING A HEAVY FINANCIAL BURDEN WILL OFTEN BE UNABLE TO PROVIDE COMPETENT ASSISTANCE

The State Bar of California contends that the word "request" in section 1915(d) cannot be properly construed so as to give courts the power to compel uncompensated representation from attorneys. *See* n.2, *supra*. However, if the word "request" is deemed ambiguous or indefinite, the Court should turn to considerations of public policy to interpret the intended meaning. *See, e.g., Fullinwider v. Southern Pac. R.R. Co.*, 248 U.S. 409, 412 (1919); *see generally Sutherland, Statutory Construction*, Section 56.01 (4th ed.). The *in forma pauperis* provisions of the Judicial Code were enacted to implement the policy of facilitating access by indigents to the federal courts, and that policy should therefore inform any interpretation of the statute. *See, e.g., Mastro Plastics Corp. v. National Labor Relations Board*, 350 U.S. 270, 285 (1956) ("'[i]n expounding a statute, we must . . . look to the provisions of the whole law, and to its object and policy'") (*quoting United States v. Boisdore's Heirs*, 52 U.S. 63 (1851)).

The policy of meaningful access to the courts will not be advanced by establishing a power on the part of federal courts under section 1915(d) to compel unwilling attorneys, without compensation, to represent indigent litigants.

A. Substantial Financial Burdens Are Imposed on Counsel in Accepting an Engagement Pursuant to 28 U.S.C. Section 1915(d)

Attorneys appointed to represent indigent parties, without provision for compensation or reimbursement, will be unable to provide their clients with meaningful representation in many, if not most, cases where assistance of counsel is needed. Attorneys who must maintain a large caseload in order to meet their overhead costs may be unable to devote the long hours to, or pay the high cost of, investigation, discovery and trial preparation needed in cases such as the action in which Mr. Mallard was appointed.

Out-of-pocket expenditures will be necessary in order to provide adequate representation. Failing to compensate appointed attorneys forces those attorneys to consider choosing between substantial out-of-pocket losses on the one hand and, on the other, forgoing the depositions, expert consultants and witnesses, travel costs, and other expenses that may be needed to provide adequate and effective representation. Imposing these untenable choices on attorneys will diminish meaningful access to the courts for the indigent civil litigant and will simultaneously threaten the profession's high ethical and professional standards.

The organized bar, including the State Bar of California, has actively supported the proposition that attorneys should volunteer their services when needed to represent the defenseless or the oppressed. California attorneys already do so in significant numbers.[4] However, when a complex and time-consuming case

---

[4] Approximately 10% of the 91,587 California lawyers practicing in 1987 voluntarily participated in organized programs providing free legal assistance to those in need. 8 Cal. Lawyer No. 6, 74 (July 1988). Many more California attorneys volunteer their services *pro bono publico* in ways not affiliated with organized programs. *Id.*

is involved, it is unfair to both the litigant and the attorney to require uncompensated representation.

1. Because of the Increasing Costs of Maintaining a Law Practice, Many Attorneys Are Financially Unable to Devote Adequate Time to an Uncompensated Matter

Maintaining a law practice imposes increasing financial demands on lawyers. The standard of care for competent representation has changed, and that change, together with the increasing complexity of law, has increased both the time and the effort required for research, investigation and discovery. The sheer volume of decisional law, as well as annotated codes, digests, pleadings and practice forms, law reviews, and periodicals has made it unusual for a lawyer to research and investigate most cases without the assistance of specialized personnel or technology.

Many firms have modernized in response to the complexity of today's social, economic and legal environment and are allocating increasing percentages of their gross incomes to required automation, technology and specialized personnel. Other practitioners who have not yet brought advanced management systems into their law offices are finding that growing portions of their gross incomes go to support traditional overhead and personnel costs and the rising costs of necessary case investigation and discovery.

In 1986, before paying the lawyer, average overhead expenses associated with keeping the lawyer in his or her practice were 42.4% of gross fees. 28 Law Off. Econ. & Mgmt. 354, 355 (1987-88), analyzing Altman & Weil's *1987 Survey of Law Firm Economics*. Furthermore, in California, average expenses per lawyer amounted to 51.8% of gross revenues. *Id.* Between 1984 and 1987, overhead increased as a

percentage of gross receipts by approximately 10% in firms with 9 to 74 lawyers and by 15% in firms with 75 or more. In 1984, firms with 21 to 40 lawyers had an average overhead of 40% of law firm receipts, while in 1987 this figure was 10% higher. Firms with 75 or more lawyers went from 41% to 47%. Law Office Management & Administration Report, Issue 88-5, May 1988, at 15.

The growth of all fields of law and the introduction of new fields of law (*e.g.*, professional responsibility, computer liability law, E.R.I.S.A. tax law) have led many to specialize. This specialization in turn requires the purchase of even more research materials and reference tools. Both lawyers who specialize and those who do not find it necessary to continue their legal education, with most seminars costing anywhere from $70 to $1200 each. *See, e.g.*, PLI's Summer Calendar 1984, PLI News, Vol. 21, No. 31, April 23, 1984; ABA Master Calendar of Association Meetings for June 1, 1984; California CEB Calendar of Programs (April-June 1984). Ninety-eight percent of lawyers surveyed reported that they attend Continuing Education of the Bar courses, and the median number of courses taken in one year was 3.8. *1981 Economic and Management Survey*, Law Office Management Section, State Bar of California (June 1982).

As these statistics demonstrate, merely maintaining a law office is quite expensive. When viewed in conjunction with the increases in litigation costs noted above, it becomes apparent that involuntary, uncompensated appointment as counsel would have a severe financial impact on the average attorney. Not only must the attorney keep a law office running while working on a case which generates no income, but the attorney also forgoes opportunities to work on fee-generating matters and to attract new business. The attorney is thus forced by the court to reach into his or her own pocket and pay to keep a law office running while working on compelled and uncompensated matters. As

the following section discusses, the burden is likely to be substantial.

2. The Type of Litigation Which Will Typically Generate an Appointment Under Section 1915(d) Is, of Necessity, Complex and Therefore Expensive

According to established authority, a section 1915(d) request for counsel will be granted only in "exceptional circumstances," *see, e.g., Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *United States ex rel. Gardner v. Madden*, 352 F.2d 792 (9th Cir. 1965), and not if the litigant appears competent to handle the case on his own. *See, e.g., Rhodes v. Houston*, 258 F. Supp. 546, 579 (D. Neb. 1966); *Davis v. United States*, 214 F.2d 594, 595 (7th Cir. 1954). Consequently, cases in which section 1915(d) motions are granted are apt to be especially demanding.

Although the record below does not reflect the estimated actual expenditure of time and money necessary to represent the plaintiffs in this case, several facts indicate that this outlay would be substantial. Because there are three plaintiffs, two of whom are incarcerated at the Iowa State Penitentiary in Fort Madison, Iowa (Brief in Support of (1) Appeal of Denial of Motion to Withdraw and (2) Motion to Dismiss Appointment of Counsel, Civil No. 87-317-B, at 8), and eight defendants, and because the case is brought under 42 U.S.C. section 1983, alleging that defendants systematically filed false reports against plaintiffs and endangered plaintiffs' lives by exposing them as informers, it appears that extensive discovery will be necessary in order to establish the pertinent facts and to defend any disputed material facts. Discovery is an expensive and time-consuming, labor-intensive process.

The cost of discovery is found not only in the time spent by the attorney and the overhead costs for support staff and machines, ranging from photocopiers to computers. It is also seen in the cost of outside services which must be performed. For example, the fees of certified shorthand reporters for attending a deposition and producing transcripts often come close to the fees of the attorneys taking the deposition. Discovered documents will suggest new research projects. Investigation may be even more costly than discovery. Experts charge $100-$250 an hour and more for consultation, investigation, drafting of written reports, and expert testimony. Lawyers must pay for transportation, housing and meals of out-of-town or out-of-state experts, in addition to the costs involved in communicating with them through all phases of the case.

The question of interpretation of section 1915(d) extends far beyond the particular facts of the case in which Mr. Mallard was appointed. Statistics from other section 1983 actions challenging institutions illustrate the extensive amount of attorney time that may be necessary to successfully litigate a claim. *See, e.g., Cherco v. County of Sonoma,* No. 80-0334 TEH (N.D. Cal. Feb. 8, 1980) (5,091 attorney hours, 6,474.75 law clerk and paralegal hours); *Marin v. Rushen,* No. 80-0012 MHP (N.D. Cal. Jan. 3, 1980) (11,649 hours for a challenge to mental and medical care at San Quentin prison); *New York State Ass'n for Retarded Children, Inc. v. Carey,* 711 F.2d 1136 (2d Cir. 1983) (11,034 attorney hours); *Ruiz v. Estelle,* 553 F. Supp. 567 (S.D. Tex. 1982) (awarded $1,714,527 in fees). Although these are class actions, they help to illustrate the huge number of hours section 1983 claims involving institutional practices may entail.

The Bar Information Program of the American Bar Association's Standing Committee on Legal Aid and Indigent Defendants has compiled statistics on the average time spent by attorneys representing indigent persons in federal *habeas corpus*

cases involving the death penalty. Such cases are certainly among those for which the appointment of unwilling counsel would be authorized if the Court affirms the decision below. In pertinent part, the study shows that at the federal district court level, the median number of hours spent litigating a post-conviction death penalty case was 305, and at the federal circuit court level, 320. *Caseload and Cost Projections for Federal Habeas Corpus Death Penalty Cases in FY 1988 and FY 1989,* at 38, prepared by the Spangenberg Group for Criminal Justice Act Division Administrative Office of the United States Court. Considering that the average attorney spends about 1,600 hours per year on his or her practice, *id.*, these figures demonstrate the large time commitments involved in undertaking such cases.

B. Lack of Adequate Financial and Time Resources, Impairing a Lawyer's Ability to Represent a Client Competently, Is Cause for an Attorney to Decline Appointment

Representation by counsel, mandatory or otherwise, is meaningless unless it is competent, adequate and effective. Moreover, the attorney's professional obligations and civil duty of care require a high standard of diligent and conscientious advocacy, free of conflict. Lack of adequate financial and time resources may well impair the lawyer's ability to provide the requisite high standard of representation.

1. The Legal Context in Which Today's Lawyer Practices Requires a Very High Level of Competent Performance to Meet Duties of Care Required by Professional Standards and Licensure Laws.

The minimum components of competence include adequate knowledge, skill, time, supervision of employees or subordinates, and resources. Resources include the personnel, equipment and finances required adequately to discharge the lawyer's duties to the client. Any deficiency in these components not only compromises the ability of the attorney to perform competently, but also places the attorney's financial interests in conflict with the client's interests, serving to impede the independent judgment required to be a conscientious advocate on behalf of the client. *See People v. Barboza,* 29 Cal. 3d 375, 627 P.2d 188, 173 Cal. Rptr. 458 (1981); *Maxwell v. Superior Court,* 30 Cal. 3d 606, 639 P.2d 248, 180 Cal. Rptr. 177 (1982); *Martin v. State Bar,* 20 Cal. 3d 717, 721, 575 P.2d 757, 144 Cal. Rptr. 214 (1978); *People v. Corona,* 80 Cal. App. 3d 684, 720, 145 Cal. Rptr. 894 (1978); *United States v. Hearst,* 638 F.2d 1190 (9th Cir. 1980), *cert. denied,* 451 U.S. 938 (1981); Formal Opinion No. 1981-64 of the Standing Committee on Professional Responsibility and Conduct of the State Bar of California, *California Compendium on Professional Responsibility* at pp. II A-187 through II A-190.

To perform legal services on the client's matter competently, a member of the bar must have adequate knowledge of the area or areas of law necessary. A lawyer must check sources of information carefully and scrutinize documents before giving professional advice. A lawyer also owes a client the civil duty to discover those additional rules of law which, although not commonly known, may easily be found by standard research techniques. Even in unsettled areas of law, the lawyer must undertake reasonable research to ascertain relevant legal principles and

to make an informed decision as to a course of conduct and theory of law, based upon an intelligent assessment of the problem. If a lawyer fails to do so, he or she may be liable to the client.

Under the Model Rules of Professional Conduct ("Model Rules") promulgated by the American Bar Association, a lawyer is prohibited from accepting legal employment if the lawyer does not have the requisite competence to handle a legal matter.[5] Furthermore, unreasonable financial burden is an approved reason to decline court appointments.[6]

---

5 A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

Rule 1.1, ABA Model Rules of Professional Conduct (1987).

A lawyer shall not represent a client or, where representation has commenced, shall withdraw . . . if: . . . the representation will result in violation of the Rules of Professional Conduct .

Rule 1.16 *id.*

6 A lawyer shall not seek to avoid appointment by a tribunal to represent a person except for good cause, such as: . . . representing the client is likely to result in an unreasonable financial burden on the lawyer.

Rule 6.2 *id.*

2. Adequate Financial Resources Are a Necessary Part of Competent Representation

A lawyer who does not have adequate financial resources to discharge the responsibilities to the client (*e.g.*, to advance the costs of litigation or to pay overhead when he or she will receive no compensation) is not competent to accept or continue employment.

In California, Rule of Professional Conduct 6-101 recognizes that adequate financial resources and time are a necessary component of attorney competence. The rule requires that a lawyer refuse employment if the lawyer does not have both adequate resources and sufficient time to perform the services competently. If the lawyer discovers that he or she does not have the requisite resources and time to devote to the client's matter, the rule requires the lawyer to withdraw from employment.[7]

---

7 RULE 6-101. FAILING TO ACT COMPETENTLY.

(A) (1) Attorney competence means the application of sufficient learning, skill, and diligence necessary to discharge the member's duties arising from the employment or representation.

(2) A member of the State Bar shall not intentionally or with reckless disregard or repeatedly fail to perform legal services competently.

(B) Unless the member associates or, where appropriate, professionally consults another lawyer who the member reasonably believes is competent, a member of the State Bar shall not

C. A Lawyer Must Decline Appointment if the Lawyer is Unable to be a Conscientious Advocate on Behalf of the Client

A lawyer must have undivided loyalty to the client's interests and must decline appointment if unable to be a conscientious advocate on behalf of the client. In order to ensure undivided loyalty, a lawyer may not accept or continue representation if the lawyer has a conflict of interest. *See* rules 4-101 and 5-102, California Rules of Prof. Conduct; Model Rule 1.7. A lawyer's personal financial interests may be a cause of conflict with a lawyer's advocacy of the client's interests. *See, e.g., Maxwell, supra; Hearst, supra.*

---

(1) Accept employment or continue representation in a legal matter when the member knows that the member does not have, or will not acquire before performance is required, sufficient time, resources and ability to, perform the matter with competence, or

(2) Repeatedly accept employment or continue representation in legal matters when the member reasonably should know that the member does not have, or will not acquire before performance is required, sufficient time, resources and ability to, perform the matter with competence.

(C) As used in this rule, the term "ability" means a quality or state of having sufficient learning and skill and being mentally, emotionally and physically able to perform legal services.

(Amended by order of California Supreme Court, effective October 21, 1983.)

If the lawyer fails to exercise conscientious fidelity on behalf of the client or has a conflict of interest, the lawyer may be removed or disqualified. *People v. Marsden*, 2 Cal. 3d 118, 465 P.2d 44, 84 Cal. Rptr. 156 (1970); *Big Bear Mun. Water District v. Superior Court*, 269 Cal. App. 2d 919, 75 Cal. Rptr. 580 (1969).

If a lawyer is compelled involuntarily to represent an indigent, there is a potential danger that the lawyer may favor fee-generating cases over non-fee-generating cases. A lawyer who is trying to make ends meet may fail to exert the effort required in the indigent's case, simply because his or her financial problems will not be helped by efforts on a non-fee-generating case. A lawyer who is struggling financially may also be disinclined to investigate potential defenses or spend money required to develop those defenses.

Notwithstanding the high standards and idealism of the legal profession, actual performance will determine whether or not involuntary appointment of counsel serves the policy of meaningful access to the courts. Can a lawyer who is forced by the court to represent a person whom he or she has not voluntarily accepted as a client make a commitment of conscientious fidelity to the client's cause? Even if the conscripted lawyer makes a conscientious effort to represent the client, the lawyer may inadvertently fail to take actions to protect client interests. The involuntary nature of a lawyer's appointment creates an inherent conflict of interest which can only lead to ineffective representation.

Significant attorney-client problems can thus be expected to flow from the imposition of mandatory uncompensated representation, including: (1) serious conflicts of interest between the attorney and the imposed client, resulting from disagreements over litigation tactics and the economic burdens on the involuntarily appointed attorney; (2) serious questions as to whether the

services of an involuntarily appointed attorney tend to be of significantly lower quality and less effective than those provided pursuant to consensual attorney-client relationships; and (3) serious problems of due process, equal protection, and fairness arising from the financial impact upon attorneys "selected" for appointment without reasonable compensation or without reimbursement of expenses. In order to provide meaningful representation, courts are required to appoint competent counsel capable of undivided loyalties.

D. The Only Feasible Method of Ensuring Competent Representation to the Disadvantaged, Absent Counsel Willing to Volunteer Competent Services, Is to Spread the Cost to All Citizens as the Social Cost of the Administration of Our System of Justice

While *pro bono* services rendered by members of the bar will always be an important supplement to publicly funded and administered legal aid, they cannot replace it. Indeed, there is reason for apprehension that involuntary appointments of counsel who would otherwise participate in organized *pro bono* programs may disrupt those programs. Most organized pro bono programs carefully direct their resources based on studies of how to serve the most severe needs for legal help. *Ad hoc*, case by case appointments may divert *pro bono* counsel away from serving even greater needs.[8] Thus, government must bear pri-

---

8 Moreover, the few existing public interest law firms might be particularly inviting candidates for appointment because many such firms specialize in the areas of law raised by *in forma pauperis* litigants. These public interest firms are probably the least able to stretch their resources further. Involuntary appointment of a public interest firm would mean, in practice, shifting free legal help away from clients that the firm believes to be more in need.

mary responsibility for ensuring delivery of legal services adequate to ensure that all stand equal before the law.

Recent history teaches that public funding is critical for any significant progress to be made in providing the indigent with equal access to our state and federal justice systems or in affording the legal protections which those systems guarantee the more economically fortunate among us. Public funding is especially critical today, when the financial cost of providing competent and conscientious advocacy is high and steadily increasing.

The Legal Services Corporation Act specifically identified the premise that any meaningful satisfaction of the indigent's equal access rights to the civil justice system depended upon quality representation. In enacting this legislation, the Congress expressly found:

> . . . (1) [T]here is a need to provide equal access to the system of justice in our Nation for individuals who seek redress of grievances.

42 U.S.C. section 2996(1);

> . . . (2) [T]here is a need to provide high quality legal assistance to those who would be otherwise unable to afford adequate legal counsel and to continue the present vital legal services program.

42 U.S.C. section 2996(2);

* * * * *

> . . . (6) [A]ttorneys providing legal assistance must have full freedom to protect the best interests of their clients in keeping with the Code of Professional Responsibility, the Canons of Ethics, and the *high standards of the legal profession*.

42 U.S.C. section 2996(6) (emphasis added).

However, the Legal Services Corporation is not currently meeting all the legal needs of the indigent, and the private bar is unable to make up the difference.

A solution to the unmet legal needs of the least among us cannot rest solely on the backs of private attorneys. It must, to be at all adequate, be supported by the entire populace. Fundamentally, the problem of effective access to the court system affects more than the immediate parties and the bar. It affects all citizens, for the cost of inefficient court proceedings prolonged by unrepresented parties is enormous. Furthermore, parties denied access to the courts often incur other social costs: abandoned mothers and children, unable to obtain and enforce support orders, are destined to rely on welfare; injured men and women unable to gain compensation for their injuries end up relying on public assistance; institutions designed to rehabilitate the criminal or to aid the mentally ill which instead abuse their power are allowed to continue harming their charges to the ultimate social and financial detriment of society.

Our system of justice is predicated on equality: the adversarial system expects that each side will have an equal opportunity to understand the proceedings and to state its case to a finder of fact. If people are forced to choose between dealing alone with urgent legal problems or abandoning their rights, they will lose their respect for the rule of law, and, on a more elemental level, justice will not be served. Any approach to solving the problem of equality of access to the courts must therefore be informed by a consideration of the tremendous stake which all of society holds in our system of justice.

As shown above, it would be financially difficult for the private bar to assume what is essentially a society-wide obligation. Because the financial burden will lead attorneys to do a less than adequate job of representation, mandatory uncompensated service as a solution to indigent court access is doomed to failure.

The foregoing concerns are at least reason to question the district court's interpretation of section 1915(d). To the extent that public policy is used to interpret section 1915(d), both separation of powers and judicial restraint dictate that the public policy ramifications be clear and unequivocal. If appointing uncompensated counsel will not actually implement the public policy of meaningful access to the judicial system, such an interpretation cannot be the definitive exegesis of section 1915(d). A modest and restrained judiciary should not resort to questionable solutions to important issues of public policy in order to interpret ambiguous statutes, particularly in light of the fact that in over 95 years the courts have not applied section 1915(d) in the manner asserted by this district court. Nothing in either the language or the legislative history of section 1915 demands the conclusion that attorneys may be compelled to serve without compensation. This, coupled with the substantial possibility that the district court's interpretation will actually do violence to the motivating policy of court access, requires that the issue be resolved legislatively. The issue of representation for the indigent is one for the legislative branch, and, at the least, cannot be implemented through a system of forced representation that is dubious in both interpretative legitimacy and ultimate efficacy.

There must thus be a solution which disperses the burden over the whole of society. Possibilities include increased funding for Legal Services, both at the federal and local levels, using interest earned on attorneys' client trust accounts, instituting a reimbursement or "judicare" program such as the ones utilized in Great Britain, parts of Canada and most other industrialized nations, using a percentage of punitive damage awards in civil cases to create a fund for the provision of services, etc. The options are numerous and need to be resolved by the legislature. However, lack of current legislative solutions does not justify visiting the considerable weight of the problem upon a tiny segment of society, the private bar, particularly when the visitation does nothing of substance to solve the problem and in fact may exacerbate it.

II. THE STATUTE MUST BE CONSTRUED TO AVOID VIOLATING THE FIFTH AMENDMENT PROHIBITION AGAINST TAKING PRIVATE PROPERTY FOR PUBLIC USE WITHOUT JUST COMPENSATION

Statutes must comport with the Constitution. Although interpretative presumptions favor the constitutionality of an act of the legislature, "[a]s a corollary of the presumption favoring constitutionality, the fact that one among alternative constructions would involve serious constitutional difficulties is reason to reject that interpretation in favor of another." *Sutherland, supra* at section 45.11. *See, e.g., United States v. Clark*, 445 U.S. 23, 33-34 (1980); *Application of United States*, 427 F.2d 639, 643 (9th Cir. 1970). Because, as demonstrated below, lawyers have a property interest in their time, the district court's interpretation of section 1915(d) must be rejected as violative of the Fifth Amendment in that involuntary appointment would constitute a taking of property without compensation.

The Fifth Amendment to the Constitution prohibits governmental taking of private property for public use without just compensation. U.S. Const. amend. V. Nothing in the language of the Amendment, nor in its subsequent interpretation by the courts, limits the definition of "property" to tangible physical assets. Rather, many attributes of the asset allegedly taken are considered, the most prominent of which is the economic impact

of the governmental action. Thus, the Court stated in *Kaiser Aetna v. United States* that it had been unable to

> develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. . . . Rather, it has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries that have identified several factors – such as the economic impact of the regulation, its interference with reasonable investment-backed expectations and the character of the governmental action – that have particular significance.

444 U.S. 164, 175 (1979), *quoting Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978); *see also Prune-Yard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980). The Court also noted that "'[c]onfiscation may result from a taking of the use of property without compensation quite as well as from the taking of the title.'" *Kaiser, supra* at 174, n. 8, *quoting Chicago, Rock Island and Pacific Railway v. United States*, 284 U.S. 80, 96 (1931). The Court has routinely transcended the barriers of literalism and applied a Fifth Amendment analysis to the essential attributes of the asset allegedly taken rather than merely to its outward manifestation, and has been concerned with the character of the government's action and its impact upon the affected party. *See Kaiser, supra.* Because the inquiry has focused on economic damage rather than on the physical nature of the asset damaged, the logic of the Court's analyses indicates that an attorney's time should be denominated property and subjected to the same analysis.

Examples of non-tangible property rights which the Court has held subject to the takings clause include, *inter alia*, the franchise of a corporation (*Monongahela Navigation Co. v. United States*, 148 U.S. 312, 344 (1893)); letters-patent for a

new invention (*James v. Campbell*, 104 U.S. 356, 358 (1882)); the right to draw a portion of water (*International Paper Co. v. United States*, 282 U.S. 399 (1931)); the value of liens held by material men (*Armstrong v. United States*, 364 U.S. 40, 50 (1960)). The concern of the Court in these and similar cases has been with the income-producing value of the right taken.

Moreover, a majority of state courts which have considered the issue of whether free work for indigent litigants is an enforceable duty of the private bar have held that it is not. *See State ex rel. Stephan v. Smith*, 242 Kans. 336, 747 P.2d 816, 835 (1987). As long ago as 1854 ("To the attorney, his profession is his means of livelihood. His legal knowledge is his capital stock," *Webb v. Baird*, 6 Ind. 13, 17 (1854)), and as recently as last December ("An attorney's advice and counsel is indeed his or her stock in trade," *Stephan*, 747 P.2d 816, 842 (1987)), courts have held that an attorney's time is property and subject to the takings clause.

In *Stephan*, the Supreme Court of Kansas examined the nature of the burden imposed on attorneys who are compelled to provide uncompensated legal services to indigent criminal defendants. Despite the fact that a Kansas statute mandated that compensation of $30 per hour be provided, the court found that the average overhead of the attorneys who testified in court exceeded $30 per hour, and noted that "some private attorneys are actually losing money when the State pays them less than it costs to keep their offices open, and they realize nothing for their personal services." *Id.* at 830. The court went on to hold that "[w]hen the attorney is required to advance expense funds out-of-pocket for an indigent, without full reimbursement, the system violates the Fifth Amendment. Similarly, when an attorney is required to spend an unreasonable amount of time on indigent appointments so that there is genuine and substantial interference with his or her private practice, the system violates the Fifth Amendment." *Id.* at 842. *Accord State ex rel. Partain v.*

Oakley, 159 W. Va. 805, 227 S.E.2d 314, 319 (W. Va. 1976) ("where . . . appointments . . . impair [the attorney's] ability to engage in the remunerative practice of law, or where the attorney's cost and out-of-pocket expenses attributable to representing indigent persons . . . reduce the attorney's net income from private practice to a substantial and deleterious degree, the requirements must be considered confiscatory and unconstitutional").

The *Stephan* court based its holding on the fact that "[a]ttorneys' services are their livelihood, and conscripting their services is akin to taking the goods of merchants or the taking of the services of an architect, engineer, accountant, or physician . . . . Moreover, when attorneys are required to donate funds out-of-pocket to subsidize a defense, they are deprived of property in the form of money." *Stephan, supra* at 842. *See also* Cheatham, *Availability of Legal Services: The Responsibility of the Individual Lawyer and of the Organized Bar,* 12 U.C.L.A. L. Rev. 438 (1965); *accord Partain, supra* at 319 (it is "axiomatic that an attorney's time is his stock in trade and that at some point, the impositions made on that time constitute an effective deprivation of the right to engage freely in the profession"); *Bradshaw v. Ball,* 487 S.W.2d 294, 298 (Ky. 1972); *McNabb v. Osmundson,* 315 N.W.2d 9, 16 (Iowa 1982); *DeLisio v. Alaska Superior Court,* 740 P.2d 437, 438 (Alaska 1987) (under state constitutional provision). *Cf. Williamson v. Vardeman,* 674 F.2d 1211, 1215 (8th Cir. 1982) (Fifth Amendment violation when attorneys required to advance expenses out of own funds). *Compare People ex rel. Conn v. Randolph,* 35 Ill. 2d 24, 219 N.E.2d 337, 341 (1966), and *Bias v. State,* 568 P.2d 1269, 1272 (Okla. 1977) (in both cases, court found losses by attorneys so great as to be unconstitutional and ordered reimbursement).

After careful consideration of history and of the law from other jurisdictions, the *Stephan* court concluded:

> Attorneys, like the members of any other profession, have for sale to the public an intangible — their time, advice and counsel. Architects, engineers, physicians, and attorneys ordinarily purvey little or nothing which is tangible. It is their learned and reflective thought, their recommendations, suggestions, directions, plans, diagnoses, and advice that is of value to the persons they serve. It is not the price of paper on which is written the plan for a building or a bridge, the prescription for medication, or the will, contract, or pleading which is of substantial value to the client; it is the professional knowledge which goes into the practice of the profession which is valuable . . . .
>
> Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation . . . . We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection.

Id. at 841-42.

In *Menin v. Menin,* 79 Misc. 2d 285, 359 N.Y.S.2d 721 (Sup. Ct. 1974), the Court examined recent right to counsel cases, concluding that

> [n]owhere in the right to counsel cases does the Supreme Court state that counsel must be assigned to serve without compensation [cites omitted]. Indeed, in the very recent decision of *Gagnon v. Scarpelli,* . . . it was noted that one factor to be emphasized in requiring assistance of Appointed counsel is 'the financial cost to the State'. Implicit in the above statement is the requirement of payment for assigned legal representation.

Menin, supra at 725. The *Menin* court went on to hold that "in civil actions, lacking criminal overtones, counsel is not required to serve without compensation and, in fact, has the constitutional right to demand payment or reject the assignment." *Id.* at 729.[9]

Although this Court has not yet addressed the issue of whether the time of an attorney is subject to the takings clause, its other pronouncements on the issue provide guidance. In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, California,* 107 S. Ct. 2378 (1987), the Court held that government activities short of the exercise of eminent domain which amount to even a temporary taking are subject to the strictures of the just compensation clause. The Court declared that "[i]t is axiomatic that the Fifth Amendment's

---

9 *Cf. State ex rel. Scott v. Roper,* 688 S.W.2d 757, 768-69 (Mo. 1985); *Family Div. Trial Lawyers of Superior Court-D.C., Inc. v. Moultrie,* 725 F.2d 695, 705-6 (D.C. Cir. 1984); *Bedford v. Salt Lake County,* 22 Utah 2d 12, 47 P.2d 193, 195 (1968); *Webb v. Baird, supra. But see United States v. Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966); *Sparks v. Parker,* 368 So. 2d 528, 533 (Ala.), *appeal dismissed,* 444 U.S. 803 (1979); *United States v. 30.64 Acres of Land, supra.* However, those cases holding that compelling uncompensated services is not a Fifth Amendment taking rest their holdings primarily on the assertion that attorneys have an enforceable obligation to render uncompensated services. *Dillon, supra* at 635; *Sparks, supra* at 533. At best this is a premise which rests on questionable historical ground. For example, the English common-law examples of obligatory service were accompanied by various forms of compensation. *See* Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 N.Y.U. L. Rev. 735, 743-53 (1980). The public service obligation on the part of lawyers, while extremely important to the profession, falls short of a valid basis for imposing on a particular lawyer a very substantial burden that should be borne more broadly.

just compensation provision is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id. quoting Armstrong v. United States,* 364 U.S. 40, 49 (1960).

In *United States v. Fuller,* 409 U.S. 488, 490 (1973), the Court observed that the "constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness, . . . as it does from technical concepts of property law."

The juxtaposition of an analysis of the fundamental attributes of the Constitutional concept of property with an analysis of this Court's previous guidelines on the "takings" issue and the recent developments in state case law reveals that not only is there no logical reason that an attorney's time cannot be considered property, but that in fact the factors identified by the Court in *Penn Central, supra,* strongly support the conclusion that an attorney's time is subject to Fifth Amendment protections.

First, the economic impact of involuntary appointment would be great and in some instances may be devastating because, given today's economic environment, the commercial reality is that practicing law in a professionally responsible manner requires a significant commitment of financial resources. As shown above, the expenses of overhead and the escalating cost of discovery and litigation are a significant burden on an attorney, particularly one forced to render uncompensated services. Second, the district court's action in this case is a substantial interference with "reasonable, investment-backed expectations." A legal practice requires the investment of time and money to acquire a legal education, open and maintain a practice, obtain clients, keep abreast of current legal developments, and provide the level of representation necessary adequately to counsel one's clients. These investments give value to the time of the lawyer.

Fundamentally, therefore, an attorney's time and the fees that time generates are no less an investment-backed expectation than is a piece of real estate purchased by a buyer in anticipation of an increase in value or to use for a commercial venture.

The right to practice law is a protected property interest, *see, e.g., Willner v. Committee on Character and Fitness*, 373 U.S. 96, 102 (1963); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 238-39 (1957), and compelled uncompensated representation is surely a taking of property by the government for public use, in that it creates a serious economic impact on the attorney, and it requires the expenditure of his or her own funds in order to fulfill an essentially public and governmental function: the delivery of legal services to the indigent and the attendant fulfillment of the promise of American justice — equal access to the courts for all.

CONCLUSION

Present measures are insufficient in many cases to allow indigent persons meaningful access to the courts. Improvement is gravely needed. Interpreting section 1915(d) to allow appointment of involuntary, uncompensated counsel would create merely an appearance of improvement rather than the reality. The considerations of public policy and Constitutional law

discussed above lead the State Bar of California respectfully to submit that the judgment below should be reversed.

Dated: November 17, 1988

DIANE C. YU*
THE STATE BAR OF CALIFORNIA
555 Franklin
San Francisco, CA 94102
Telephone: (415) 561-8200

JACK W. LONDEN
MORRISON & FOERSTER
345 California Street
San Francisco, California 94104-2675
Telephone: (415) 434-7415

**Denotes Counsel of Record*

(1)

No. 87-1490

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

JOHN E. MALLARD,

Petitioner,

—v.—

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE

ALEXANDER R. SUSSMAN*
1 New York Plaza
New York, New York 10004
(212) 820-8000

OGDEN NORTHROP LEWIS
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

**Counsel of Record for Amicus The Association of the Bar of the City of New York*

SHELDON OLIENSIS
ALAN ROTHSTEIN
JOHN G. KOELTL
JONATHAN J. RUSSO
JOHN R. LEWIS
MARGUERITE MITCHELL
Of Counsel

29 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Statutes and Rules

PAGE

Other Authorities

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 87-1490

JOHN E. MALLARD,

Petitioner,

—v.—

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York (the "Association") submits this brief in support of the position of the Respondents.* The Association is a not-for-profit corporation whose nearly 18,000 members consist primarily of members of the bar who practice in the City of New York. The Association's purposes include "cultivating the science of jurisprudence, promoting reforms in the law [and] facilitating and improving the administration of justice." Constitution of the Association, Art. II.

---

* Letters of consent to the filing of this brief have been obtained from the parties and filed with the Clerk in accordance with Rule 36.2 of the Rules of this Court.

This case presents important issues concerning the authority of the federal district courts to appoint counsel for civil litigants who are indigent. While it may be preferable to provide legal services to indigents in worthy cases either through government programs or by the private bar on a voluntary rather than mandatory basis, this case presents the issue of weighing the interests of indigent parties, the federal courts, and the bar when government-sponsored or voluntary *pro bono* representation is not available to those parties.

We submit that there is ample authority, both statutory and judicial, to permit federal district courts to appoint counsel to represent indigent parties in appropriate civil cases. In this case the District Court acted within its authority in appointing Petitioner and did not abuse its discretion in denying his motion to withdraw.

This brief was prepared by the Association's standing committees on Legal Assistance and the Federal Courts, composed of members of the bar interested in and experienced with issues relating to *pro bono* representation and federal court administration.

STATEMENT

The Association of the Bar of the City of New York adopts the statement of facts as set out in the Respondents' brief.

SUMMARY OF ARGUMENT

The issue in this case is whether the District Court for the Southern District of Iowa has the authority, either under 28 U.S.C. § 1915(d) or otherwise, constitutionally to require an attorney who is admitted to that court to represent an indigent civil litigant. If the court has such authority and did not abuse it in this case, the Court of Appeals' denial of mandamus should be affirmed. *See Gulfstream Aerospace Corp.* v. *Mayacamus Corp.*, 108 S. Ct. 1133, 1143 (1988); *Roche* v. *Evaporated Milk Ass'n*, 319 U.S. 21, 32 (1943).

We submit that the District Court had such authority and that the record reflects no abuse of the court's power in this case. The policy and intent of section 1915, as reflected in its language and legislative history, support the District Court's reasonable interpretation that section 1915(d) permits district courts, when necessary and appropriate, to assign counsel on a mandatory, rather than voluntary, basis.

Moreover, section 1915(d) surely does not preclude a mandatory assignment.* In this case, the District Court exercised its authority under a local practice and procedure for the assignment of counsel in indigent cases. The court's action under the local practice was wholly consistent with both the policy of section 1915 to give indigents their day in court and with the mandate of the Federal Rules of Civil Procedure to assure the just and speedy determination of every action. Fed. R. Civ. P. Rule 1.

Finally, the District Court also had the inherent authority to appoint Petitioner if it believed the assignment of counsel was necessary to effectuate the fair administration of justice. Petitioner, a member of the bar of the court, made no clear showing that his appointment by the court was misguided, abusive, or impinged upon any of his constitutional rights. The District Court properly provided needed representation to the

---

• Even though the District Court relied on 28 U.S.C. § 1915(d) for its holding that the court was empowered to appoint attorneys to represent indigent civil litigants, *see Traman* v. *Parkin*, Civ. No. 87-317-B, slip op. at 2 (S.D. Iowa, October 27, 1987) (Appendix to Petition for Writ of Certiorari at 3a), the order of the Court of Appeals may be affirmed on other grounds. The order must be affirmed if the District Court had the power, from whatever source, to appoint Petitioner, even if the lower court relied upon the wrong grounds or gave a wrong reason. *See Helvering* v. *Gowran*, 302 U.S. 238, 245 (1937); *see also Roche* v. *Evaporated Milk Ass'n*, 319 U.S. at 32 (mandamus is not appropriate in a situation where "the district court has acted within its jurisdiction and has rendered a decision which, even if erroneous, involved no abuse of power").

indigents at the cost of imposing some burden and inconvenience on Petitioner. Accordingly, the Court of Appeals was correct in not disturbing the District Court's action.

ARGUMENT

I.

THE DISTRICT COURT IS AUTHORIZED TO APPOINT COUNSEL UNDER 28 U.S.C. § 1915(d)

Section 1915(d) of Title 28 of the United States Code provides that a federal court may "request" an attorney to represent an indigent civil litigant. This law has remained substantially unchanged since Congress established the statutory framework for suits *in forma pauperis* almost a century ago with the passage of the Act of July 20, 1892, 27 Stat. 252 (1892). The District Court, relying on the Eighth Circuit decision in *Peterson* v. *Nadler*, 452 F.2d 754 (8th Cir. 1971), held that section 1915(d) authorized the appointment of Petitioner, against his will, to represent indigent litigants in a civil suit.* Although the wording of section 1915(d) is ambiguous, the legislative history of the 1892 Act suggests that Congress did intend that the federal courts have the power to compel an attorney to represent an indigent client when no attorney volunteers.

When the intent of Congress is clear from the words of a statute, the Court should look no further and the "plain

---

* Petitioner is incorrect in his assertion that the Eighth Circuit "stands alone" in holding that section 1915(d) authorizes mandatory appointments. The Courts of Appeals for the Fourth and Fifth Circuits appear to have reached the same conclusion. *See Whisenant* v. *Yuam*, 739 F.2d 160, 163 n.3 (4th Cir. 1984) ("A federal court has discretion to appoint counsel if doing so would advance the proper administration of justice"); *Ulmer* v. *Chancellor*, 691 F.2d 209, 213 (5th Cir. 1982) ("cases construe the statute as authorizing a court to 'appoint' counsel").

meaning" of the statutory language controls. *Caminetti* v. *United States*, 242 U.S. 470, 485 (1917). When the wording of a statute is ambiguous, however, as in section 1915(d), the Court may properly turn to legislative history for expressions of congressional intent. *Id.* at 490. *See also Commissioner of Internal Revenue* v. *Engle*, 464 U.S. 206, 217 (1984); *United States* v. *Taylor*, 108 S. Ct. 2413, 2424 (1988) (Scalia, J., concurring).

The word "request" in section 1915(d) is not, as Petitioner argues, unambiguously a word that precludes mandatory appointments. To "request" means to "ask." *Webster's Third New International Dictionary* 1929 (1966). While "ask" can mean "seek," in the sense that compliance is purely voluntary, it can also mean "demand." *Id.* at 128. A request is more polite than a demand, but, when made from a position of authority, is not necessarily less compulsory. The essential point is that, since "request" has at least two "ordinary and usual" meanings, *Caminetti*, 242 U.S. at 485, the words of section 1915(d) alone do not reveal the intent of Congress.

Moreover, words in a statute must be considered in light of their contemporary meaning. *Lake County* v. *Rollins*, 130 U.S. 662, 671 (1889). To the drafters of section 1915(d) the words "request" and "assign" were interchangeable. The title of the 1892 Act, for example, used the word "assign" not "request." 27 Stat. 252 (1892) ("An act providing when plaintiff may sue as a poor person and when counsel shall be *assigned* by the court") (emphasis added).* Further, the bill that became section 1915(d) was introduced on the floor of both the Senate and the House of Representatives as a bill

---

* The title of section 1915 and the following discussion in this brief answer Petitioner's argument that other statutes providing counsel for poor persons use the word "assign" not "request." *See Brief for the Petitioner* at 18.

empowering courts to "assign" counsel for poor persons. 23 Cong. Rec. 5199, 6264 (1892). Similarly, it appears that contemporary judges uniformly believed that "request" meant "assign," because every decision interpreting section 1915(d) during the first forty years after its enactment used the word "assign" to describe the statute. *See, e.g., Brinkley* v. *Louisville & N.R. Co.*, 95 F. 345, 353 (C.C.W.D. Tenn. 1899) (tracing origin of section 1915(d) to an English statute of Henry VII authorizing judges to "assign" and "appoint" attorneys for poor persons). *See also Boyle* v. *Great Northern Ry. Co.*, 63 F. 539 (C.C.E.D. Wash. 1894) ("assign"); *Whelan* v. *Manhattan Ry. Co.*, 86 F. 219, 220-221 (C.C.S.D.N.Y. 1898) ("assign"); *Phillips* v. *Louisville & N.R. Co.*, 153 F. 795, 797 (C.C.N.D. Ala. 1907), *aff'd*, 164 F. 1022 (5th Cir. 1908) ("assign"); *United States ex rel. Randolph* v. *Ross*, 298 F. 64, 66 (6th Cir. 1924) ("assign"). Even this Court, in a 1948 decision interpreting section 1915(d)'s predecessor, used the word "appoint" instead of "request." *Adkins* v. *E.I. DuPont de Nemours & Co., Inc.*, 335 U.S. 331, 342 (1948).

That the drafters of section 1915(d) and the early cases interpreting the statute used "appoint" and "assign" as synonyms for "request" supports the interpretation that an attorney can be compelled to represent an indigent under section 1915(d). At the least, it shows that the contrary interpretation cannot be found in the words of the statute alone.

The correct interpretation is confirmed by the legislative history of section 1915(d). In a colloquy in the House of Representatives on June 9, 1892, during debate over the bill that became section 1915(d), Representative Culberson explained to Representative Stone that, when an indigent litigant loses his suit and cannot pay court costs, officers of the court will not be paid for their services in the case:

> Rep. STONE: In a case where the plaintiff is wholly unable to pay the costs where there is a judgment against him for the costs, how do the officers get their pay?

> Rep. CULBERSON: They do not get any in that event.
>
> Rep. STONE: Then you are simply compelling the officers to do that work for nothing.
>
> Rep. CULBERSON: We are simply in these cases of charity and humanity *compelling* these officers, all of whom make good salaries, to do this work for nothing. That is all the bill does. There may be one such case upon a docket of five hundred; and they are not required to do much ex-officio service.

23 Cong. Rec. 5199 (1892) (emphasis added).

This unambigous expression of congressional intent that federal courts have the power under the statute to compel court officers to work without compensation should guide the Court's interpretation of the word "request". An attorney is also an officer of the court. To require an attorney to represent an indigent is consistent with Congress' express intention in enacting section 1915 that other officers of the court would have the obligation to work for indigents without pay.

II.

THE DISTRICT COURT HAS THE AUTHORITY TO APPOINT COUNSEL UNDER RULE 83 OF THE FEDERAL RULES OF CIVIL PROCEDURE AND 28 U.S.C. § 2071

The Federal Rules of Civil Procedure are promulgated by this Court under the authority of 28 U.S.C. § 2072.* Rule 83

---

* 28 U.S.C. § 2072 (1982) provides in relevant part that "[t]he Supreme Court shall have the power to prescribe by general rules, the forms of process, writs, pleadings, and motions, and the practice and procedure of the district courts and courts of appeals of the United States in civil actions, including admiralty and maritime cases, and appeals therein, . . ."

of the Federal Rules of Civil Procedure provides, in relevant part, that "[i]n all cases not provided for by rule, the district judges and magistrates may regulate their practice in any manner not inconsistent with these rules or those of the district in which they act."* Similarly, 28 U.S.C. § 2071 (1982) provides that "[t]he Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business. Such rules shall be consistent with Acts of Congress and rules of practice and procedure prescribed by the Supreme Court."

Taken together, therefore, Rule 83 and section 2071 establish that a United States District Court, in all cases not provided for by the Federal Rules of Civil Procedure or by its local rules, may regulate the practice to be followed in proceedings properly before it in any manner not inconsistent with the Federal Rules of Civil Procedure or statute. *See, e.g., Franquez* v. *United States,* 604 F.2d 1239, 1244-45 (9th Cir. 1979) (district court did not exceed its jurisdictional authority by granting a jury trial on just compensation issue when federal statute did not provide for same); *Petrol Shipping Corp.* v. *Kingdom of Greece,* 360 F.2d 103, 109 (2d Cir.), *cert. denied,* 385 U.S. 931 (1966) (court may fashion rule concerning service of process outside the Federal Rules if service under Rule 4 was not available); *In re United Corp.,* 283 F.2d 593, 596 (3d Cir. 1960) (approving district court procedure for settling any dispute for allowances of fees and expenses).

---

* One of the members of the Advisory Committee on the Federal Rules of Civil Procedure noted that problems left unanswered by the Federal Rules should be disposed of under Rule 83 (the decision-making power) on an ad hoc basis "in accordance with general principles of justice and common sense." *See* A.B.A. Federal Rules of Civil Procedure, Proceedings of the Institute at Washington and of the Symposium at New York City 129 (1939) *quoted in* Note, *Rule 83 and The Local Federal Rules,* 67 Colum. L. Rev. 1251, 1253-1255 (1967).

In *Frazier* v. *Heebe,* 107 S. Ct. 2607 (1987), Chief Justice Rehnquist outlined the analysis applied by this Court in determining the validity of a district court's local rule under these standards.* The inquiry is limited to determining:

> [1] whether the rule conflicts with an Act of Congress; [2] whether the rule conflicts with the rules of procedure promulgated by the [Supreme Court]; [3] whether the rule is constitutionally infirm; or [4] whether the subject matter governed by the rule is not within the power of a lower federal court to regulate.

Id. at 2616 (the Chief Justice, dissenting) (citing *Colgrove* v. *Battin,* 413 U.S. 149, 159-160 (1973); *Miner* v. *Atlass,* 363 U.S. 641, 651-52 (1960)).**

The local practice at issue in the present case evolved as follows: In *Nelson* v. *Redfield Lithograph Printing,* 728 F.2d 1003 (8th Cir. 1984), the Court of Appeals for the Eighth Circuit, commenting on the reluctance by some judges to request lawyers to appear in *pro bono* cases, directed the chief judge in each district to maintain a sufficient list of attorneys practising in the district in order to supply the court with competent attorneys to serve in *pro bono* cases. *Id.* at 1005. In response to this directive, the judges of the United States District Court for the Southern District of Iowa ordered the clerk of the court to prepare a list of attorneys from which appointments were to be made under 28 U.S.C. § 1915(d).

---

* Although the Court of Appeals did not rule on the validity of the local practice in the Southern District of Iowa, such an analysis is essential to the resolution of whether the district court acted within its power when it made the appointment, albeit under Rule 83 as opposed to section 1915(d). *See supra* at 3, n* and cases there cited.

** *Frazier* applies because an established local practice and continued usage will be given the same effect as a written local rule of the court. *See MacNeil* v. *Hearst Corp.,* 160 F. Supp 157, 160 (D. Del. 1958) (citing *Hill* v. *United States,* 298 U.S. 460 (1936)).

See Coburn v. *Nix*, Civ. No. 86-716-B, slip op. at 2 (S.D. Iowa, June 16, 1987) (Appendix to Brief in Opposition to Petition for Writ of Certiorari at 2a).

The Southern District of Iowa thus established a local practice that any attorney admitted to practice in the District, who was in good standing and who had appeared as counsel in a non-bankruptcy federal case in the previous five years, was eligible for appointment. The court divided an alphabetized list of these attorneys into three panels and all appointments for a given year were made out of one panel. Attorneys served on a rotating basis within each panel. Therefore, no attorney would be unfairly burdened by frequency of appointment. Morever, under this appointment procedure, account was also taken of those attorneys who (1) had accepted *pro bono* cases in state court within the preceding year; (2) had a busy schedule at the time of the appointment; and (3) had to travel some distance to represent a client. *See Coburn, supra* (Appendix to Brief in Opposition to Petition for Writ of Certiorari at 1a).

That local practice is valid under the *Frazier* standards. First, the local practice does not conflict with an Act of Congress, since, as demonstrated in Point I above, the word "request" in 28 U.S.C. § 1915(d) has at least two meanings, one of which is synonymous with "demand." Second, the local practice does not conflict with the rules of procedure promulgated by this Court, since there is no rule in the Federal Rules of Civil Procedure addressing the power of a court to make such appointments. Third, as discussed in Point IV below, there is no constitutional infirmity in the practice. Finally, as shown in Point III below, the local practice is clearly within the power of the District Court.*

---

* In *Frazier*, this Court recognized that a district court has the authority to adopt a local rule or practice "necessary to carry out the conduct of its business," so long as the practice is consistent with "the principles of right and justice." *Frazier*, 107 S. Ct. at 2611 (quoting *In re Ruffalo*, 390 U.S. 544, 554 (1968)). *See infra* Point III.

III.

THE DISTRICT COURT HAS THE INHERENT POWER TO APPOINT COUNSEL

Nothing in 28 U.S.C. § 1915(d) impinges upon a district court's exercise of its inherent powers for the purposes of achieving a just adjudication of a case through the appointment of an attorney to represent a civil litigant unable to employ his own counsel. *See Bowman* v. *White*, 388 F.2d 756, 761 (4th Cir.), *cert. denied*, 393 U.S. 891 (1968) (section 1915(d) "is merely descriptive of the court's inherent power").

This Court has recognized that if certain action is necessary and essential to the proper administration of justice, federal courts have the inherent authority to take the required action. For example, this Court has held that federal courts have an inherent power of contempt. *See Michaelson* v. *United States*, 266 U.S. 42 (1924) (power of contempt is essential to the administration of justice); *Cooke* v. *United States*, 267 U.S. 517, 539 (1925) (the power of contempt is essential in protecting the due and orderly administration of justice and in maintaining the authority and dignity of the court); *Levine* v. *United States*, 362 U.S. 610 (1960) (the power to convict for criminal contempt has been deemed an essential and inherent aspect of the existence of the federal courts). The Court has also recognized the power of federal courts to sanction, and to appoint masters and experts as necessary adjuncts to promote the judicial process. *See Roadway Express, Inc.* v. *Piper*, 447 U.S. 752, 765 (1980); *Link* v. *Wabash R.R. Co.*, 370 U.S. 626, 630-31 (1962); *Ex parte Peterson*, 253 U.S. 300, 313 (1920).

Most significantly, this Court has often stated that a federal court has the inherent authority to regulate the conduct of its bar, a power which necessarily relies in large measure on the lawyer's position as an officer of the court. *See In re Snyder*, 472 U.S. 634, 643 (1985); *see also Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378-379 (1867). In *Theard* v. *United States*, 354 U.S. 278, 281 (1957), this Court adopted the rationale of

Justice Cardozo, while Chief Judge of the New York Court of Appeals, concerning the court's control over an attorney: "Membership in the bar is a privilege burdened with conditions." *Id.* at 281. The Court also stated that an attorney admitted to the court becomes "an officer of the court, and, like the court itself, an instrument or agency to advance the ends of justice." *Id.* at 281.

As an officer of the court, a member of the bar enjoys certain powers that others do not possess. For example, admission to the bar creates a license not only to advise and counsel clients, but also to appear in court, try cases, and cause persons to become witnesses in court and for depositions. Such benefits, however, come with corresponding burdens, one of which is that a lawyer, as an officer of the court, is obligated to represent indigents for no compensation upon court order. *See Hurtado* v. *United States,* 410 U.S. 578, 588-589 (1973); *see also United States* v. *Dillon,* 346 F.2d 633, 635 (9th Cir. 1965), *cert. denied,* 382 U.S. 978 (1966) (legal profession has historical obligation to serve indigents without compensation); *Family Div. Trial Lawyers* v. *Moultrie,* 725 F.2d 695, 705 (D.C. Cir. 1984). *Cf. In re Snyder, supra* at 644-645 (license granted by the court requires members of the bar to conduct themselves in a manner compatible with the role of the courts in the administration of justice). As the Court of Appeals for the Third Circuit recently stated:

> There is a symbiotic relationship between the court and the attorneys who are members of its bar. The court's responsibility for the administration of justice would be frustrated were it unable to enlist or require the services of those who have by virtue of their license, a monopoly on the provision of such services.

United States v. *Accetturo,* 842 F.2d 1408, 1413 (3d Cir. 1988).

Petitioner argues that the issue in the present case is whether lawyers will continue to enjoy their traditional freedom to choose the circumstances under which they perform

pro bono services. *See Brief for the Petitioner* at 26-27. However, attorneys have never had such unfettered freedom. In *Powell* v. *Alabama,* 287 U.S. 45, 72-73 (1932), this Court stated that "[a]ttorneys are officers of the court, and are bound to render service when required by . . . appointment." *

Finally, the reasoning underlying the Court's recent decision in *Penson* v. *Ohio,* 57 U.S.L.W. 4020 (U.S. 1988), supports the authority of district courts to assign counsel in appropriate cases. The *Penson* opinion reiterates the now well-established principle in the criminal context that lawyers "are necessities, not luxuries." *Id.* at 4022 (quoting *Gideon* v. *Wainwright,* 372 U.S. 335, 344 (1963)). The Court also noted in *Penson* the "paramount importance of vigorous representation," which "follows from the nature of our adversarial system of justice." 57 U.S.L.W. at 4022.

Although the Court has not to date recognized any constitutional right to counsel for indigents in civil cases, those observations are relevant to civil proceedings and especially relevant to this case, where the issue is not the constitutional right of the indigent civil litigant in the abstract but rather the power of the District Court to administer justice fairly in particular cases where the court deems the appointment of counsel necessary. Certainly, the significance of forceful and careful advocacy in achieving truth and fairness in court proceedings warrants and legitimizes the District Court's appointment of counsel for indigents to achieve those goals.

---

* Thus, there is no support for the observation made by Amici California Attorneys for Criminal Justice that federal courts lack the power to compel an attorney to represent even criminal defendants. *See also United States* v. *Bowe,* 698 F.2d 560, 566 (2d Cir. 1983); *Bristol* v. *United States,* 129 F. 87, 88 (7th Cir. 1904). *Ferri* v. *Ackerman,* 444 U.S. 193 (1979), which held that appointed attorneys are not entitled to absolute immunity from malpractice suits, and is cited by Amici, never addressed this issue.

IV.

THE APPOINTMENT OF COUNSEL DOES NOT VIOLATE THE CONSTITUTION

A. The Fifth Amendment Does Not Require that Counsel Be Compensated

Petitioner argues that compulsory representation of indigent civil litigants without compensation violates the Fifth Amendment by taking an attorney's property for public use without just compensation. Petitioner's appointment, however, does not contravene the Fifth Amendment.* While it is conceivable that compelled representation without compensation might under some circumstances become so burdensome as to constitute an unconstitutional taking of property, there was no taking here — both because the District Court followed a procedure for insuring that Petitioner's appointment was not overly burdensome, and because Petitioner neither claimed nor made any showing of undue burden.

The District Court would have violated the Fifth Amendment by appointing Petitioner to represent the indigent clients in this case only if (1) Petitioner's legal services are "property" within the meaning of the Fifth Amendment, and (2) the appointment was a "taking" requiring compensation. *See Penn Central Transp. Co.* v. *New York City*, 438 U.S. 104, 124-25 (1978).

---

* Petitioner also argues that his appointment violates the First Amendment because he feels incompetent and dislikes confrontation. *See Brief for the Petitioner* at 40. This argument is entirely unsupported in the record, and is undercut by his concession that federal courts can legally compel unwilling attorneys to represent indigent civil litigants under 42 U.S.C. § 2000e-5(f)(1), *see Brief for the Petitioner* at 20-21, and indigent criminal defendants under 18 U.S.C. § 3006A(b), *see Brief for the Petitioner* at 22-23 n. 1.

An attorney's legal services are "property" if the attorney has a "reasonable expectation" that his services are for his private use only. *Penn Central*, 438 U.S. at 125. Although professional services may under some circumstances constitute "property,"* holdings of this Court make clear that an attorney has no reasonable expectation that he will never be called upon to represent an indigent civil litigant without compensation. *See, e.g., Hurtado* v. *United States*, 410 U.S. 578, 588-89 (1973) ("the Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed," for example, "representation of indigents by court-appointed attorney"); *cf. Moultrie*, 725 F.2d at 705 (because attorneys were repeatedly informed of possibility of assignment of cases for no pay, they had no "expectation rising to the level of a property right that they would be compensated"). To the extent that an attorney should reasonably expect that he can be required by public authority to represent an indigent client without pay, the attorney has no protected property interest in such representation.

Moreover, the compulsory representation involved in this case is not a "taking" for purposes of the Fifth Amendment. First, there can be a taking only if the governmental interference harms the individual's "reasonable investment-backed expectations." *United States* v. *Locke*, 471 U.S. 84, 107 (1985). *See Hodel* v. *Irving*, 107 S. Ct. 2076, 2083 (1987); *Keystone Bituminous Coal Ass'n* v. *DeBenedictus*, 480 U.S. 470, 497 (1987). Under the ethical rules of the profession, an attorney should anticipate that a portion of his practice will be devoted to *pro bono* representation, and he has an ethical

---

* *See Butler* v. *Perry*, 240 U.S. 328, 333 (1916) ("for some purposes labor must be considered as property"). *Cf. Dillon*, 346 F.2d at 636 (unnecessary to decide if attorney's services are property); *Tyler* v. *Lark*, 472 F.2d 1077, 1079 n.3 (8th Cir. 1977) (same); Green, *Court Appointment of Attorneys in Civil Cases: The Constitutionality of Uncompensated Legal Assistance*, 81 Colum. L. Rev. 366, 385-86 (1981) (arguing that attorneys' services are property).

obligation to accept *pro bono* appointments absent "compelling reasons," Model Code of Professional Responsibility EC 2-29 (1980), or "good cause," Model Rules of Professional Conduct Rule 6.2 (1984).* Thus, only an extraordinarily burdensome court appointment would frustrate an attorney's reasonable economic expectations.

Secondly, no taking occurs where, in the words of Justice Holmes, there is an "average reciprocity of advantage" between the injury caused by the specific government action and the benefit to the individual from the overall regulatory scheme. *Pennsylvania Coal Co.* v. *Mahon,* 260 U.S. 393, 415 (1922). *See also Penn Central,* 438 US. at 147 (Rehnquist, J., dissenting) (explaining that zoning is not a taking because "on the whole an individual who is harmed by one aspect of zoning will be benefited by another"); *Hodel,* 107 S. Ct. at 2083; *Keystone,* 480 U.S. at 491.

Just as Petitioner is called upon periodically to provide uncompensated legal services to indigents, he gains advantages from public authority through his license to practice law. The government grants attorneys a monopoly to practice law that is of substantial economic benefit, and in a sense even creates the demand for an attorney's services. *See* Green, *supra,* at 389-90. Under these circumstances,

---

• *See also Dillon,* 346 F.2d at 635 (no taking because an "applicant for admission to practice law may justly be deemed to be aware . . . that a lawyer is an officer of the court obligated to represent indigents for little or no compensation upon court order"). *Accord Williamson* v. *Vardeman,* 674 F.2d 1211, 1215 (8th Cir. 1982) (citing ten additional cases holding that requiring counsel to serve without compensation is not a taking); *Tyler* v. *Lark,* 472 F.2d 1077, 1079 (8th Cir. 1973), *cert. denied sub nom. Beilenson* v. *Treasurer of United States,* 414 U.S. 864 (1973); *Dolan* v. *United States,* 351 F.2d 671, 672 (5th Cir. 1965).

Petitioner enjoys a "reciprocity of advantage," and there is no taking of his services.*

B. Counsel Is Not Required to Pay the Expenses of a Section 1915(d) Appointment

Petitioner suggests that it is a violation of the Constitution for a court to compel an attorney to pay the expenses that arise from representation of an indigent. *See Brief for the Petitioner* at 51. Along the same line, Amici California Attorneys for Criminal Justice make much ado about what they view as the conflict between a lawyer's natural desire to spend as little of his own money as possible and his duty of reasonable thoroughness and preparation. *See Brief for California Attorneys for Criminal Justice* at 26-38. Amici go so far as to inform the Court that because of this conflict, appointed lawyers should be held to a lower standard of care than those who have paying clients, and ask the Court to

---

• Again, we recognize that if the burden of the appointment creates a substantial hardship, far outweighing the benefit conferred by the state through the license to practice law, then the Fifth Amendment might require compensation. Shapiro, *The Enigma of the Lawyer's Duty to Serve,* 55 Harv. L. Rev. 735, 775 (1980). *See Moultrie,* 725 F.2d at 705-707 (taking if appointment "effectively denies [attorney] the opportunity to maintain a remunerative practice"); *State ex rel. Partain* v. *Oakley,* 227 S.E.2d 314, 319 (W. Va. 1976) (same); *Bias* v. *State of Oklahoma,* 568 P.2d 1269, 1271-73 (Okla. 1977). *See also People ex rel. Conn* v. *Randolph,* 219 N.E.2d 337, 341 (Ill. 1966) (appointment unconstitutional because counsel suffered "extreme, if not ruinous, loss of practice and income"); *State of Missouri* v. *Green,* 470 S.W.2d 571, 573 (Mo. 1971) ("the burden is more than the profession also should shoulder"); *Honore* v. *Washington State Board of Prison Terms and Paroles,* 466 P.2d 485, 496 (Wash. 1970) (counsel appointed to represent habeas corpus petitioners must be compensated because of "extremely heavy and time consuming burden"). The District Court, however, followed a procedure here that was designed to insure, and on the record did insure, that Petitioner was not overly burdened by the appointment. *See Coburn, supra* (Appendix to Brief in Opposition to Petition for Writ of Certiorari at 2a).

reconsider its ruling in *Ferri* v. *Ackerman*, 444 U.S. 193 (1979), that appointed lawyers have no immunity from malpractice suits.

The Court, however, need not consider whether requiring an attorney to pay the expenses of representing an indigent client might, in some general sense, create an intolerable conflict of interest, or might violate the Constitution, because there is no showing here that Petitioner would have been responsible for his out-of-pocket expenses. Rather, the procedure established by the Court of Appeals for the Eighth Circuit in *Nelson* v. *Redfield Lithograph Printing*, 728 F.2d 1003 (8th Cir. 1984), is for the district courts to reimburse appointed counsel for all expenses made in good faith. *Id.* at 1005. *Cf. Williamson* v. *Vardeman*, 674 F.2d 1211, 1215-16 (8th Cir. 1982) ("lawyers have no duty to pay expenses"). The payment of expenses is thus — in this case, at least — an issue that this Court need not address.*

---

* Regardless of whether an attorney can constitutionally be compelled to spend his own money preparing and presenting a case for trial, we note that the Model Rules of Professional Conduct state that "a lawyer representing an indigent client *may* pay court costs and expenses of litigation on behalf of the client." Rule 1.8(e)(2) (1984) (emphasis added). We believe that if an appointment of counsel were to reach this kind of alleged unconstitutional imposition on counsel, *a fortiori* grounds would have been established for counsel to seek relief from his appointment for cause. *See* Model Rules of Professional Conduct Rules 1.16(b)(5), 6.2(b) (1984).

V.

COUNSEL IS ETHICALLY OBLIGATED TO ACCEPT THE APPOINTMENT

Finally, contrary to Petitioner's contentions,* his appointment is entirely consistent with the ethical standards of the legal profession. Even without a court appointment, attorneys are ethically obligated to provide uncompensated public interest legal service. *See* Model Code of Professional Responsibility EC 2-25 (1980) (the rendition of free legal services to those unable to pay reasonable fees continues to be an obligation of each lawyer, and every attorney should support all proper efforts to meet this need for legal services); Model Rules of Professional Conduct Rule 6.1, Comment (1984) ("The basic responsibility for providing legal services for those unable to pay ultimately rests upon the individual lawyer . . .").

Attorneys have an ethical duty to accept proper court appointments to represent indigent litigants. The Model Code of Professional Responsibility states that when an attorney is "appointed by a court . . . to undertake representation of a person unable to obtain counsel, he should not seek to be excused from undertaking the representation except for compelling reasons." Model Code of Professional Responsibility EC 2-29 (1980). The Model Rules of Professional Conduct similarly subject an attorney to discipline if he seeks to avoid

---

* Petitioner argues that the appointment process is inconsistent with Disciplinary Rule 6-101(A)(1) of the Iowa Code of Professional Responsibility for Lawyers, which states that "[a] lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it." *See Brief for the Petitioner* at 30. In the present case, the District Court held, however, that Petitioner was competent to represent plaintiffs in the underlying action.

a court appointment without "good cause." Model Rules of Professional Conduct Rule 6.2 (1984).

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Dated: New York, New York
December 30, 1988

Respectfully submitted,

ALEXANDER R. SUSSMAN*
1 New York Plaza
New York, New York 10004
(212) 820-8000

SHELDON OLIENSIS
ALAN ROTHSTEIN
JOHN G. KOELTL
JONATHAN J. RUSSO
JOHN R. LEWIS
MARGUERITE MITCHELL
Of Counsel

OGDEN NORTHROP LEWIS
1 Chase Manhattan Plaza
New York, New York 10005
(212) 530-4000

**Counsel of Record for Amicus*
The Association of the Bar
of the City of New York

(8)

NO. 87-1490

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN E. MALLARD,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, et. al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR LEGAL SERVICES CORPORATION OF IOWA AS *AMICUS CURIAE*

MARTIN OZGA
LEGAL SERVICES CORPORATION
OF IOWA
315 E. 5th St.
Des Moines, Iowa 50309
(515) 243-2151

28 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN E. MALLARD,

Petitioner,

vs.

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA, et. al.,

Respondents.

BRIEF OF *AMICUS CURIAE*

This brief is submitted by the Legal Services Corporation of Iowa as *amicus curiae* and in support of respondents.

INTEREST OF THE LEGAL SERVICES CORPORATION OF IOWA

The Legal Services Corporation of Iowa (LSCI) is a private non-profit corporation incorporated under the Iowa Nonprofit Corporation Act, Chapter 504A, Code of Iowa (1987). LSCI was incorporated in February of 1977 for the purpose of, inter alia, securing justice for and protecting the rights of low-income people throughout the State of Iowa, advancing the knowledge of legal aid among the general public, and cooperating with the state and federal courts and "any other person or group interested in the administration of justice." LSCI Articles of Incorporation.

The Legal Services Corporation of Iowa provides civil legal assistance to low-income individuals in 98 of Iowa's 99 counties. LSCI currently employs 49 attorneys and 6 paralegals to provide services to the estimated 519,000 low-income persons in the State of Iowa. In federal fiscal year 1988, LSCI provided some form of legal assistance to 20,746 low-income individuals. The services ranged from relatively brief activities such as legal counseling to more intensive state and federal court trials, appeals, and class action lawsuits.

Because of the minimal number of advocates available to provide legal services to potentially eligible individuals, [1] LSCI has restricted the types of cases that it will accept. This has been accomplished by a series of public meetings soliciting client input; letters requesting input from the private bar, LSCI staff, and service providers throughout the state; and a final "Priority Planning Conference" held in October of 1984. As a result of this process, LSCI developed a list of substantive areas which were to be given priority in providing assistance to eligible individuals. The statement of priorities, adopted by the LSCI Board of Directors in July of 1985, contained high, medium, and low priority substantive areas. Among the high priority areas were cases involving Aid to Families with Dependent Children, Medicaid, federally subsidized housing, rights

[1] LSCI's current financial eligibility policies require that the income of a family or individual be less than 125% of the 1984 federal poverty guidelines established by the U.S. Department of Health and Human Services.

of the mentally disabled, and family abuse. Low priority cases included tort matters, wills, adoptions, and prisoners' rights issues. The priority list was developed to recognize the most pressing legal needs of potential LSCI clients, and is constantly undergoing review.

In 1982, LSCI, in cooperation with the Iowa State Bar Association, created the Volunteer Lawyers' Project (VLP) as an attempt to harness the resources of private attorneys throughout the state on behalf of low-income individuals. The VLP attempts to refer cases, on an entirely pro bono basis, to attorneys who participate on the VLP panel. There are currently approximately 800 Iowa attorneys on the VLP panel. VLP attorneys closed 1452 cases in fiscal year 1988. The clients referred to VLP attorneys undergo the same income screening as do LSCI clients, and the cases handled generally reflect LSCI priorities. Intake of VLP cases is conducted in nine LSCI regional offices, and referral of the cases is accomplished by staff located in LSCI's Central Office in Des Moines.

In 1985, as a response to the decision of the Eighth Circuit Court of Appeals in *Nelson v. Redfield Lithographic Printing*, 728 F.2d 1003, 1005 (8th Cir. 1984), the U.S. District Court for the Southern District of Iowa developed a list of attorneys practicing in that court for purposes of appointments to represent indigent individuals under 28 U.S.C. §1915 (d). Currently, any attorney admitted to practice in the Southern District of Iowa who has appeared in a non-bankruptcy federal case in the past five years is eligible for appointment. The VLP administers

the appointment system for which LSCI receives no recompense. The District Court provides the VLP with a list of eligible attorneys, which is divided alphabetically into three panels. Attorneys from the first third of the list were called upon for service in 1986, the second third in 1987, and the final third in 1988. The VLP personally contacts each attorney informing him or her of the placement.

The Legal Services Corporation of Iowa has two interests in this case. First, LSCI is organizationally committed to increasing the access of low-income individuals to the courts. The appointment system operated by the Southern District of Iowa is a means of increasing access to the courts for individuals found to be indigent under 28 U.S.C. §1915. Second, LSCI, as manager of the Volunteer Lawyers' Project, has an administrative interest in the continued operation of the current appointment system.

SUMMARY OF ARGUMENT

The federal referral system in the Southern District of Iowa operates in a manner consistent with the language and intent of 28 U.S.C. §1915 (d). The burden imposed on individual members of the bar by the federal referral system is minimal, and is made necessary by the increasing volume of pro se cases in the Southern District of Iowa, and by earlier failures to establish an adequate voluntary system.

In the absence of an effective voluntary system for representing indigent litigants, the appointment process

operated in the Southern District of Iowa is an essential method of insuring that effective and meaningful access to the courts is preserved for these litigants. The right of access to the courts has been deemed to be one of the fundamental rights protected by the Constitution, and arises from the privileges and immunities clause of article 4 of the Constitution, the first amendment, and the due process clause of the fourteenth amendment.

To fully implement the right of access to the courts, the access granted must be "adequate, effective, and meaningful." In many cases, meaningful access to the courts cannot be accomplished in the absence of the appointment of counsel. Counsel need not be appointed in every case, but in those situations where the court has reviewed the pro se complaint filed by an indigent litigant, and determined that the litigant will be incapable of proceeding adequately pro se, counsel should be appointed by the court. In many cases, effective representation can be achieved only if counsel is appointed.

The imposition of time and financial burdens on individual attorneys will not lead to a lack of conscientious representation of indigent litigants. The time commitment involved in an appointment under 28 U.S.C. §1915(d) is generally not so great as to materially limit the lawyer's ability to represent the client. The canons of ethics of the legal profession, in addition to the general professional competence of the bar, insure that conscientious representation will be maintained, even in situations where the attorney is appointed to represent an indigent litigant.

Appointment of counsel is consistent with the long-standing goal of the legal profession to promote justice. The decision of the Eighth Circuit Court of Appeals should be affirmed.

ARGUMENT

APPOINTMENT OF ATTORNEYS TO REPRESENT INDIGENT LITIGANTS UNDER 28 U.S.C. §1915 (d) INSURES MEANINGFUL ACCESS TO THE COURTS

A. The Burden Imposed By The Appointment System Does Not Place Undue Pressures On Attorneys Requested To Serve.

The central claim presented by petitioner focuses on the rights of an attorney to refuse a proffered "appointment" under 28 U.S.C. §1915(d). Petitioner's argument centers on his literal interpretation of the word "request" as a precatory invitation for members of the bar to serve the needs of indigent litigants. The focus of petitioner's argument obscures the interests of the individuals addressed in §1915(d) — those who are unable to afford counsel. LSCI urges the Court to decide the discrete issue presented in light of this larger context.

The courts have long wrestled with the necessity of appointment of counsel in both the criminal, *Powell v. Alabama*, 287 U.S. 45 (1932), and civil contexts. The circuit courts, although noting that there is no constitutional right to the appointment of counsel in civil proceedings, *Poole v. Lambert, 819 F.2d 1025, 1028 (11th Cir.*

1987); *Whisenant v. Yuam*, 739 F.2d 160, 163 (4th Cir. 1984); *Nelson*, 728 F.2d at 1004; *Peterson v. Nadler*, 452 F. 2d 754, 757 (8th Cir. 1971), have struggled to make counsel available to indigent individuals with potentially meritorious claims. In *Poole*, for example, the court urged the district courts in the circuit to develop "imaginative and innovative" methods of addressing complaints filed by low-income individuals, typically prisoners. 819 F.2d at 1028. In *Whisenant*, the court noted that denial of counsel to an indigent litigant could potentially lead to the denial of a fundamentally fair trial, and noted the duty on the part of the bar to represent indigent plaintiffs with colorable claims. 739 F.2d at 163-164. [2]

The Eighth Circuit Court of Appeals has acted forcefully to assure that the rights of low-income litigants are protected. In *Peterson*, the court recognized that §1915(d) gave the district court the power to appoint counsel for indigent litigants. 452 F.2d at 757. The *Nelson* court built upon the *Peterson* decision and, writing under the court's "general supervisory power over the district courts," ordered chief judges throughout the circuit to:

> seek the cooperation of the bar associations and the federal practice committees of the judge's district to obtain a sufficient list of attorneys practicing throughout the district so as to supply the court with competent attorneys who will serve in pro bono situations such as the case presented.

---

[2] It is notable that this Court has appointed counsel in cases where an individual was proceeding in forma pauperis. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335, 338 (1963); Supreme Court Rule 46.6.

728 F.2d at 1005; *cf. In the Matter of Snyder*, 734 F.2d 334, 339 (8th Cir. 1984), *rev'd on other grounds*, 472 U.S. 634 (1985) (every licensed attorney has an implied obligation to perform pro bono work). The Federal Practice Committee of the Iowa State Bar Association, in cooperation with the district courts, attempted, pursuant to the court's mandate in *Nelson*, to solicit attorneys to participate voluntarily in handling pro bono cases, but the result of this solicitation effort was negligible. Thus, the district court was forced to use a mandatory system. At first, this system focused exclusively on attorneys with extensive federal court experience. This system proved too burdensome on the relatively few active federal court practitioners and was replaced by the current system in February of 1986.

Although the appointment system presents those appointed with a serious challenge, the task confronting the bar is made more manageable by the screening process that occurs under §1915 prior to the time counsel is "requested" to serve or is "appointed" by the district court. In *Maclin v. Freake*, 650 F.2d 885 (7th Cir. 1981), the court adopted criteria for determining whether the appointment of counsel was necessary. The factors considered included the merits of the claim, the existence of underlying credibility disputes and involved factual issues, the capability of the indigent litigant to present the case, and the complexity of the legal issues presented. *Id.* at 887-888; *see McNeil vs. Lowney*, 831 F.2d 1368, 1371 (7th Cir. 1987); *Hodge v. Police Officers*, 802 F.2d 58,60 (2d Cir. 1986); *In re Lane*, 801 F.2d 1040, 1043-44 (8th Cir. 1986);

McCarthy v. Weinberg, 753 F.2d 836, 839 (10th Cir. 1985). Other courts have concluded that counsel need be appointed only in "exceptional circumstances." *U.S. v. 30.64 Acres of Land*, 795 F.2d 796, 799 (9th Cir. 1986). The exceptional circumstances test has been merged with factors similar to those used in *Maclin* in at least one circuit. *Bemis v. Kelley*, 857 F.2d 14, 15-16 (1st Cir. 1988).

The number of cases that will be assigned to pro bono counsel is thus limited by the interpretation of §1915(d) by the courts. The number of cases placed in Iowa demonstrates that the burden imposed, although it can be significant in individual cases, is not oppressive. The VLP began placing federal referrals in February of 1986. In 1986, 73 cases were placed; 99 cases were placed in 1987; and 87 cases have been placed in 1988 through November 30, 1988.[3] The appointment of attorneys from the alphabetical list begun in February of 1986 did not conclude until September of 1988. No attorneys have been asked to participate in the appointment process more than once since the system was inaugurated. In addition, attorneys who previously agreed to participate in the VLP panel are exempted from participation. The assumption underlying the program is that attorneys will not be appointed more than once every five to six years, because attorneys who had performed pro bono services the first time through the list would not be appointed to serve the second time the list was used.

---

[3] This figure represents only those cases placed by the VLP. There may be some cases, particularly when the referral system was first becoming operational, that were placed by the clerk of the district court.

B. Appointment Under §1915(d) Insures The Right Of Access To The Courts Is Preserved For Indigent Civil Litigants.

When the burden placed on licensed attorneys is juxtaposed with the effective denial of access to the courts caused by the absence of counsel, the decision of the Eighth Circuit to view appointment under §1915(d) as mandatory is further strengthened. Although the assistance of counsel is constitutionally protected only in criminal matters:

> The actual concerns of the poor do not reflect the law's sharp distinction between civil and criminal litigants. Poverty only magnifies the importance of protecting one's property from seizure by legal process. The poor man may be evicted, his furniture may be repossessed, his welfare payments cut off, his children taken from him.

Note, *The Indigent's Right to Counsel in Civil Cases*, 76 Yale L.J. 545 (1967). While §1915(d) applies to all civil cases, most requests for the appointment of counsel in §1915(d) situations will arise in the prison context. Despite the difficulties that this may cause:

> we must bear in mind that unpopular and even obstreperous litigants are entitled to the full measure of their legal rights. We must be particularly careful that civil rights litigants are afforded their full rights and that neither the unpopularity of their cause nor any perceived belligerency on their part, or other unwillingness or inability to conform to a normal mode, underlies or plays any part in a failure to appoint counsel.

Bradshaw v. U.S. District Court for the Southern District of California, 742 F.2d 515, 519 (9th Cir. 1984) (Reinhardt, J., concurring).

The right of access to the courts has been deemed to be one of the fundamental rights protected by the Constitution. In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142, 148 (1907), this Court acknowledged the importance of access to the courts, and described the right of access in the following manner:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.

The Court in *Chambers* premised the right of access on the privileges and immunities clause of article 4 of the Constitution and the fourteenth amendment. The right of access has also been predicated on the first amendment right to petition for redress of grievances. In *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), the Court concluded that the right to petition "extends to all departments of the Government. The right of access to the courts is indeed but one aspect of the right to petition." 404 U.S. at 510.

Access rights have also been premised on the due process clause of the fourteenth amendment. In *Wolff v. McDonnell*, 418 U.S. 539 (1974), the Court noted that access to the courts by prisoners was not limited to preparation of petitions for habeas corpus. The right of access to the courts, according to *Wolff*:

> is founded on the Due Process Clause and assures that no person will be denied the opportunity to

> present to the judiciary allegations concerning violations of fundamental constitutional rights. It is futile to contend that the Civil Rights Act of 1871 has less importance in our constitutional scheme than does the Great Writ.

418 U.S. at 579. The right of access to the courts, regardless of whether it is premised on privileges and immunities, the first amendment, or due process, insures that disputes will be resolved in a fair and impartial manner, without the necessity for disruptive action.

In order to fully implement the right of access to the courts, the access granted must be "adequate, effective, and meaningful." *Bounds v. Smith*, 430 U.S. 817, 822 (1977). In *Bounds*, the Court canvassed its decisions that had helped insure increased access to the courts for prisoners, *id.* at 822-823, and concluded that "meaningful access" to the courts was the touchstone. *Id.* at 823, citing *Ross v. Moffitt*, 417 U.S. 600, 611, 612, 615 (1974). The Court held that the constitutional right of access to the courts required prisons to provide inmates with "adequate law libraries or adequate assistance from persons trained in the law." *Bounds*, 430 U.S. at 828.

Meaningful access to the courts is at the heart of 28 U.S.C. §1915(d), and encompasses the appointment of counsel in certain clearly delimited situations. The State Bar of California notes, in its *amicus curiae* brief, that the concern prompting passage of §1915(d) was that access to the courts not be denied for lack of sufficient funds. Brief at 4, n.3. Access to the courts, however, encompasses more than merely being allowed to file a complaint in the federal

courts. The "meaningful access" that is the touchstone of the constitutional right of access to the courts must be sufficient to insure that the plaintiff can not only file his complaint, but can prosecute his claims in an effective and fair manner. Mere physical access to the courts, without the appointment of counsel, is not necessarily meaningful, effective, or adequate access. "To a prisoner without counsel, §1915 [42 U.S.C. §1983] provides no remedy at all." *Representation of Pro Se Civil Litigants in the Federal District Court Through the Pro Bono Panels*, 43 Rec. A.B. City N.Y. 933, 941 (1988).

The Second Circuit has recognized that §1915(d) "must be understood to guarantee indigents 'meaningful access' to the courts as required by the Constitution." *Hodge v. Police Officers*, 802 F.2d 58, 60 (2d Cir. 1986). The court also acknowledged that meaningful access did not mean that counsel must be appointed in every civil case. *Id.* In discussing the necessity of appointments, however, the court concluded that a district court must exercise its discretion to appoint counsel in light of the rules that have been developed in the circuit courts to determine whether the appointment of counsel is necessary. *Id.* at 61-62.

The rules developed by the circuit courts have clearly indicated that counsel will not be appointed merely because a claim passes the "non-frivolous" test of 28 U.S.C. §1915(d). *Lane*, 801 F.2d at 1043; *Poole*, 819 F.2d at 1028; *Howland v. Kilquist*, 833 F.2d, 639, 646 (7th Cir. 1987); *McCarthy*, 753 F.2d at 839. Recognition of this fact severely reduces the number of claims that will lead to the appointment of counsel under §1915(d). The courts have

recognized that counsel need not be appointed unless certain criteria have been met, *see Maclin*, 650 F.2d at 887-888; "exceptional circumstances" are present, *see Aldabe v. Aldabe*, 616 F.2d 1089, 1093 (9th Cir. 1980); *Bemis*, 857 F.2d at 15; or where the denial of counsel would lead to a "fundamentally unfair" trial for the person seeking the appointment of counsel, *see McCarthy*, 753 F.2d at 839, 840; *Whisenant*, 739 F.2d at 163; *Childs v. Duckworth*, 705 F.2d 915, 922, (7th Cir. 1983).

The criteria developed by the courts have so narrowed the range of cases for which counsel will be appointed that the burden of appointment to which petitioner and amici object so strenuously has been minimized. The U.S. District Court for the Southern District of Iowa, in adopting a system which attempts to equitably apportion the burden placed on individual attorneys, has further minimized the expectations placed on those attorneys. Under these well-developed rules, appointment does not occur in every in forma pauperis case, nor is appointment a recurring phenomenon. In fact, as discussed above, the total number of appointments in the 34 month history of the Southern District of Iowa's federal referral effort has been only 259 cases, an average of only seven to eight cases per month. Attorneys are, at a maximum, appointed to serve in §1915(d) cases only once every five to six years, certainly not an unreasonable burden.

The factors used by the courts in determining whether counsel should be appointed are an explicit recognition that the assistance of counsel is often a necessity for the right of access to be meaningful. The factors focus on the

complexity of the legal and factual issues presented in the complaint and on the ability of plaintiff to represent himself in court. Only where the issues presented are sufficiently complex, or where there is doubt as to the plaintiff's ability to represent himself, will counsel be appointed. In other words, only where the absence of counsel would impede the right of access to the courts is appointed counsel necessary.

The importance of counsel in both civil and criminal cases was stated forthrightly in *Powell*, 287 U.S. at 68-69:

> The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he has a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. If in any case, civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

See Gideon, 372 U.S. at 344-345. Lawyers, who act "as assistants to the court in search of a just solution to disputes," *Cohen v. Hurley*, 366 U.S. 117, 124 (1961), should be aware of the importance of the assistance of counsel in insuring meaningful access to the courts. The outcome of court proceedings, both civil and criminal, will often turn on the presence and adequate assistance of counsel, without whom a fundamentally fair trial may be denied. *Whisenant*, 739 F.2d at 162. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice." *Penson v. Ohio*, 57 U.S.L.W. 4020, 4022 (U.S. Nov. 29, 1988).

C. The Financial And Time Burdens Imposed By Appointment Will Not Lead To A Lack Of Conscientious Representation.

The State Bar of California, proceeding as *amicus curiae* in support of petitioner, argues that access to the courts will not be advanced by compelling attorneys to perform mandatory pro bono work in federal cases. The State Bar's argument is that substantial financial burdens are imposed on counsel in undertaking pro bono cases, that counsel who lack the financial and time resources to represent a client competently have good cause to decline appointment, and that attorneys must decline appointment if the attorney cannot be a "conscientious advocate on behalf of the client." Brief at 15.

The State Bar's protestations rest on the premise that lawyers will gladly perform pro bono service if requested, and will perform in a competent and effective manner the services required. If "appointed" to do so, however, these same attorneys will find the cases to which they have been

assigned too complex and time-consuming, and will be unable to conscientiously represent their clients. The State Bar's argument, if its premise were sound, would obviate consideration of the issues presented in this case. Lawyers would volunteer to perform pro bono work to the extent that all cases being filed by pro se indigent litigants would be handled by volunteer attorneys. The difficulty with the premise is that mandatory appointment has arisen precisely because voluntary systems have proven to be ineffective in allowing indigent litigants meaningful access to the courts in the form of representation by counsel. [4]

The State Bar notes that there are numerous financial disincentives to performing mandatory pro bono services. Assuming for the sake of argument that this is true, this does not provide a rationale for the argument that pro bono services may not be compelled by the courts to insure that access to the courts is maintained. Pro bono service, by its very nature, assumes that some negative financial consequences and restrictions on an attorney's time will occur. The State Bar also advances the notion that costs of discovery will be prohibitive for attorneys made to handle pro bono cases. The State Bar fails to recognize that under the federal referral process in Iowa, attorneys representing

---

[4] *See generally* 43 Rec. A.B. City N.Y. 933, in which the Committee on Legal Assistance of the New York City Bar notes the difficulty in attracting volunteers to handle the civil rights complaints of indigent individuals. The Committee notes, in a report prepared in August of 1988, that cases filed as long ago as 1982 had still not been placed, and that 28.4% of the cases pending placement with a volunteer attorney were filed before 1986. *Id.* at 933.

indigent litigants will be reimbursed for their out-of-pocket litigation costs, obviating any concern over this issue. Finally, the State Bar cites to the specter of cases which will involve thousands of hours of efforts on the part of the attorney who has been appointed. Citation is made only to class action cases involving general attacks on the conditions of confinement at various institutions. Brief at 10. The brief of *amicus* seriously overstates the necessary time commitment of counsel in pursuing a pro bono appointment. None of the cases that have required appointment in the Southern District of Iowa have been class actions, and the State Bar Association's argument on this point is hyperbole. As the Committee on Legal Assistance of the New York City Bar Association notes, "(i)ndividual prisoner complaints are *not* so complicated that they require an enormous drain on a firm's personnel and resources." 43 Record A.B. City N.Y. at 942 (emphasis in original).

Amicus also argues that the lack of time and expertise on the part of appointed counsel may hinder the access of indigent litigants. The State Bar notes that in order to perform legal services competently, a member of the bar must adequately know the law and must "undertake reasonable research to ascertain relevant legal principles and to make an informed decision as to a course of conduct and theory of law, based upon an intelligent assessment of the problem." Brief at 12-13. While this is certainly an adequate statement of the responsibilities of an attorney who has been appointed, the brief does not make clear why most appointed attorneys would not be competent to perform these functions. In Iowa, for example, LSCI has provided a number of free seminars concerning §1983 prison litigation, involving both national and state experts in the field, for those attorneys who did not feel confident of their abilities in the litigation of §1983 claims. Any problems with competence in this area can be remedied either through research or continuing legal education, assuming the attorney is generally competent.

A final argument made by the State Bar with respect to access to the courts is that a lawyer should decline an appointment if she or he is "unable to be a conscientious advocate on behalf of the client." Brief at 15. The concern of the State Bar is exemplified by the following statements:

> If a lawyer is compelled involuntarily to represent an indigent, there is a potential danger that the lawyer may favor fee-generating cases over non-fee-generating cases. A lawyer who is trying to make ends meet may fail to exert the effort required in the indigent's case, simply because his or her financial problems will not be helped by efforts on a non-fee-generating case. A lawyer who is struggling financially may also be disinclined to investigate potential defenses or spend money required to develop those defenses.

Brief at 16. The assertion of the State Bar does nothing more than point out that certain cases being handled by an attorney may give that attorney more satisfaction than other cases. Presumably, that truism holds whether an attorney has taken a case voluntarily, or has been appointed to represent a pro se indigent litigant under §1915(d). In either case, the formerly pro se litigant will still achieve greater access to the courts than he or she would have without the appointment of counsel.

The decision whether to appoint counsel should not be tested against a standard of whether a lawyer "favors" certain cases in the caseload — that will inevitably occur. Nor can a "conflict of interest" be said to exist simply because the attorney does not wish to accept a mandatory appointment. Model Rule 1.7 of the ABA Model Rules of Professional Conduct provides that a lawyer shall not represent a client if representation "may be materially limited... by the lawyer's own interests,..." Although the Rule would recognize a conflict in certain limited circumstances, conflicts do not occur under the Rule merely because an attorney is philosophically opposed to accepting a mandatory appointment.

In *Waters v. Kemp*, 845 F. 2d 260, 265 (11th Cir. 1988), the court addresses the appointment of counsel to represent an indigent litigant. After noting the duty of lawyers to accept court appointments, *id.* at 263, the court concludes:

> Before we leave the discussion on this point, we should note that virtually every lawyer who responds to a court's call to represent an indigent faces a financial loss. He may not be paid at all. If he is paid, the amount he receives may be considerably less than what he would have received had he devoted his time and effort to more lucrative work. He accepts the call because it is his bounden duty to do so, as an officer of the court. We recognize that there may be cases in which counsel's financial loss is likely to be so great that his representation of the indigent would be 'materially limited,' within the meaning of Model Rule 1.7. When that is the situation, counsel should not be appointed.

Id. at 265. The *Waters* court views acceptance of appointment as the norm, with exceptions granted in special circumstances where representation of the indigent litigant would be materially limited. This approach, which looks favorably on appointment, and allows an attorney to forego appointment only in limited circumstances, is to be preferred to the approach suggested by the State Bar of California, which would apparently allow the attorney to escape court-imposed obligations in most every situation. If the attorney can demonstrate that his or her own interests would "materially limit" representation of the indigent client, opting out of the system would be permissible. This is consistent with the present operation of the federal appointment system in the Southern District of Iowa.

The concerns expressed by the State Bar of California are also addressed by the principles enunciated in the Iowa Code of Professional Responsibility. First, the lawyer is to "assist the legal profession in fulfilling its duty to make legal counsel available" under Canon 2 of the Code, a mandate which is totally consistent with the federal referral project. Second, once an attorney has been appointed to represent an indigent claimant under §1915(d), the lawyer is bound to represent this new client in accordance with other provisions of the Code of Professional Responsibility. Among those provisions are the duty to exercise independent judgment on behalf of the client (Canon 5); [5] the

---

[5] Ethical Consideration 5-1 provides that "(t) he professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client." Iowa Code of Professional Responsibility.

duty to represent a client competently (Canon 6); and the duty to zealously represent a client within the bounds of the law (Canon 7).

It should not be assumed that lawyers who are appointed to represent indigent litigants will eschew the requirements imposed on them by the Code of Professional Responsibility. This assumption suggests that appointed attorneys will turn their backs on the long history of service in insuring that access to the courts would be open to all citizens. "Lawyers have for centuries emphasized that the promotion of justice, rather than the earning of fees, is the goal of the profession." *Ohralik v. Ohio State Bar Association*, 426 U.S. 447, 460 (1978). Appointment of counsel under §1915(d) is consistent with this longstanding principle.

CONCLUSION

The decision of the Eighth Circuit Court of Appeals to deny petitioner a writ of mandamus should be affirmed. Mandatory appointment is permissible under 28 U.S.C. §1915(d). Appointment is an essential means of insuring that the constitutional right of access to the courts is preserved for indigent litigants. Although other systems could be designed which would also meet the needs of

individuals who proceed in court in forma pauperis, those systems, even if they were presently operational, would not undercut the courts' power of appointment under §1915(d).

Dated: December 22, 1988

MARTIN OZGA
Legal Services Corporation of Iowa
315 E. 5th St.
Des Moines, IA 50309
(515) 243-2151

COUNSEL FOR *AMICUS CURIAE*
LEGAL SERVICES CORPORATION
OF IOWA

(11)

No. 87-1490

In The

SUPREME COURT OF THE UNITED STATE

October Term, 1988

JOHN E. MALLARD,
Petitioner,

V.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

GERALD F. UELMEN*
Santa Clara University
School of Law
Santa Clara, California 95053
(408) 554-4361

Counsel for Amicus Curiae
California Attorneys for
Criminal Justice

EPHRAIM MARGOLIN
240 Stockton Street
Third Floor
San Francisco, California
(415) 421-4347

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

*Counsel of Record

65pp

No. 87-1490

In The

SUPREME COURT OF THE UNITED STATE

October Term, 1988

JOHN E. MALLARD,
Petitioner,

V.

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA, ET AL.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, AMICI CURIAE, IN SUPPORT OF THE PETITIONER

GERALD F. UELMEN*
Santa Clara University
School of Law
Santa Clara, California 95053
(408) 554-4361

Counsel for Amicus Curiae
California Attorneys for
Criminal Justice

EPHRAIM MARGOLIN
240 Stockton Street
Third Floor
San Francisco, California
(415) 421-4347

Counsel for Amicus Curiae
National Association of
Criminal Defense Lawyers

*Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES

RULES

OTHER AUTHORITIES

INTEREST OF THE AMICI CURIAE.

California Attorneys for Criminal Justice (CACJ) and the National Association of Criminal Defense Lawyers, Inc. (NACDL) appear as amici curiae in support of petitioner. CACJ is a statewide organization of approximately 2,000 attorneys whose practices emphasize the defense of individuals accused of crime. The NACDL is a District of Columbia non-profit corporation that represents twenty-seven state and local affiliates and speaks for approximately twenty thousand lawyers in every state of the union, all of whom are primarily engaged in positions bringing them in daily contact with the criminal justice system. Among the stated objectives of both organizations is the promotion of

fairness in the adjudication of criminal cases in the courts of the United States.

Both organizations are vitally concerned with the issues raised by this case. No segment of the bar shoulders a heavier burden of pro bono work than criminal defense lawyers. We consistently accept court appointments to provide competent representation at rates which barely meet our overhead expenses. We frequently volunteer to provide our services at little or no cost to needy clients. We are diligent in working through these and other bar associations for improvements in our system of justice. Our efforts are frequently rewarded with public contempt and governmental indifference. Now a ruling is sought which would permit a court to compel our acceptance of appointments requiring us to serve clients in complex

civil litigation with no compensation or reimbursement, despite our own good faith assessment of our incompetence or other inability or conflicting duty. Before such a ruling is contemplated, we seek leave to raise some serious concerns about the impact such a ruling would have upon the administration of justice, and the ultimate achievement of our goal of maximizing the delivery of competent legal representation to indigent litigants.

QUESTION PRESENTED

Is a federal court empowered by 28 U.S.C. Section 1915(d) to require an unwilling attorney to represent a person making a request for counsel under that statute?

SUMMARY OF ARGUMENT

The essential argument of the petitioner is that, since 28 U.S.C. Section 1915(d) only authorizes a court to "request" an attorney to represent an indigent plaintiff, an unwilling attorney cannot be compelled to accept an "appointment" pursuant to this statute. While amici fully concur in that argument, we would like to challenge the implicit assumption that even where an "appointment" is authorized, an unwilling lawyer can be compelled to accept a client. Amici will suggest that (1) the nature of the lawyer-client relationship precludes a court from forcing a lawyer to accept a client without the lawyer's consent; (2) the ethical responsibilities of a lawyer may require the rejection of an appointment which makes no provision for the reimbursement of out-of-pocket

expenses; (3) the ethical duty to "never reject . . . the cause of the defenseless or oppressed" does not mandate the acceptance of all court appointed clients; and (4) this Court's decision in Ferri v. Ackerman, 444 U.S. 193 (1979), implicitly assumes that appointments to represent indigent clients must be voluntarily accepted by lawyers. If such appointments are to be mandated, then the denial of absolute immunity from malpractice claims established by Ferri v. Ackerman must be reconsidered.

ARGUMENT

I. THE NATURE OF THE LAWYER-CLIENT RELATIONSHIP REQUIRES VOLUNTARY ACCEPTANCE OF COURT APPOINTED CLIENTS BY THEIR LAWYERS.

The acceptance of a client by a lawyer involves a complex set of

professional and personal judgments. Regardless of whether the client has directly approached the lawyer, or has been proffered by an "appointing" or "requesting" court, the lawyer cannot and should not accept a client unless the lawyer concludes that:

(1) The lawyer can provide the "legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." A.B.A. Model Rules of Professional Conduct, Rule 1.1 (1983). Cf. A.B.A. Model Code of Professional Responsibility, Disciplinary Rule 6-101(A)(1) (1981).

(2) He or she can act "with reasonable diligence and promptness in representing" the client. A.B.A. Model Rules of Professional Conduct, Rule 1.3 (1983). Cf. A.B.A. Model Code of Professional Responsibility, Disciplinary

Rule 6-101(A)(3) (1981). As one court aptly put it, "when an attorney takes on more than he can properly handle, he jeopardizes both his client's cause and the public interest in sound and efficient administration of justice." Lopez v. Larson, 91 Cal. App. 3d 383, 400, 153 Cal. Rptr. 912, 922 (1979).

(3) The intensity of any personal feeling of repugnance for the client or the cause will not impair the effectiveness of the representation of the client. A.B.A. Model Rules of Professional Conduct, Rule 6.2(c) (1983). Cf. A.B.A. Model Code of Professional Responsibility, Ethical Considerations 2-29, 2-30 (1981).

(4) The employment is not adverse to a client, a former client, the lawyer's own self-interest, or any other conflicting interest. A.B.A. Model Rules

of Professional Conduct, Rule 1.7 (1983). Cf. A.B.A. Model Code of Professional Responsibility, Disciplinary Rules 5-101(A), 5-105(A),(C) (1981).

(5) Representation of the client is not likely to result in an unreasonable financial burden on the lawyer. A.B.A. Model Rules of Professional Conduct, Rule 6.2(b) (1983).

The evaluation of these factors requires intensive self-assessment and examination of conscience that only the lawyer involved can perform. The courts must presume that this professional judgment is made in good faith. If a lawyer's assessment of his or her own competency, potential conflicts, existing workload, current financial ability, or intensity of personal feelings is to be ignored or second-

guessed and overridden by an appointing court, the effectiveness of the ensuing attorney-client relationship may be doomed from the start. This is not to suggest that a lawyer is always the final judge of whether he or she is meeting the lawyer's responsibility to serve the public interest. That question might be addressed in a disciplinary proceeding brought by the bar, a forum which protects the lawyer's interest in the privacy of one's financial affairs and conscience, as well as the privacy of the lawyer's other clients who may present problems of conflicts or excessive workload.

The process of judicial appointment, properly conceived, requires a voluntary acceptance of the client by the lawyer. A lawyer is ethically required to decline an appointment if the attorney would be

unable, for any of the reasons outlined, to adequately represent the client. United States v. 30.64 Acres of Land, 795 F.2d 796, 800 n.7 (9th Cir. 1986); United States v. Dolan, 570 F.2d 1177, 1182 (3rd Cir. 1978).

Little authority supports the broad assertion in Powell v. Alabama, 287 U.S. 45, 73 (1932), that lawyers are "bound" to render service when required by court appointment. While the Court cited Cooley, Constitutional Limits, at p. 700 and note, for this proposition, Cooley vastly overstated the tenor of the case law. While contending it is the "duty" of lawyers to accept appointments even when no provision is made for payment, Cooley contended that "[n]o one is at liberty to decline such an appointment." But nearly every case he cited for this dubious proposition involved a denial of

a lawyer's claim for compensation or reimbursement after the lawyer had provided representation to the appointed client.[1]

A century ago, the prevailing method of providing counsel for indigents in criminal cases was for the judge to simply look around the courtroom and press the closest available lawyer-

---

[1] See Vise v. Hamilton Co., 19 Ill. 78 (1857) (mis-cited by Cooley as Vice v. Hamilton Co., 19 Ill. 18), denying a lawyer's claim for $20 for defense of accused forger; Wayne County v. Waller, 90 Pa. 99 (1879), refusing a lawyer's claim for reimbursement of $150 expenses incurred in successful defense of woman accused of murder; House v. Whitis, 64 Tenn. (5 Baxt.) 690 (1875) (mis-cited as House v. White by Cooley), refusing the claim for $25 fee by a guardian ad litem appointed to defend a minor in a civil case; and Barnes v. Commonwealth, 92 Va. 794 (1895), upholding failure to appoint counsel for defendant sentenced to death for murder, since record did not disclose request for counsel. Dicta suggests that if a request had been made, counsel could be compelled to accept appointment, citing Cooley.

victim into service. The practice was described by Justice Stephen Field in an opinion he wrote as Chief Justice of the California Supreme Court:

> [I]t is part of the general duty of counsel to render their professional services to persons accused of crime, who are destitute of means, upon the appointment of the Court, when not inconsistent with their obligations to others; and for compensation, they must trust to the possible future ability of the parties. Counsel are not considered at liberty to reject, under circumstances of this character, the cause of the defenseless, because no provision for their compensation is made by law. The duty imposed in this way may, it is true, be carried to unreasonable length, so as to become exceedingly burdensome; but we have heard no complaints of this character. It is usual for the Court to apportion the duty among the different members of the profession practicing before it so as to render it as light upon each as possible.

Rowe v. Yuba County, 17 Cal. 61, 63 (1860).[2]

---

[2] It is interesting to speculate why Chief Justice Field might have "heard no complaints of this character." It might have been because Field did not take kindly to complaints. See In re Neagle, 135 U.S. 1 (1890). More likely, it was because lawyers got the message delivered in Lamont v. Solano County, 49 Cal. 158, 159 (1874): there should not be any need for reimbursement of expenses in indigent cases because lawyers were not expected to incur any expenses in such cases. The double standard of justice for indigents then in vogue was accurately described by Meyer C. Goldman in The Public Defender, p. 18-20 (1917):

> The classes of lawyers who are usually assigned to defend, present a phase of this question which cannot be regarded as unimportant. It is a regrettable fact that in nearly all communities (particularly in the larger cities) there is a type of lawyers who are not truly representative of a great profession. Their regard for the rights and liberties of their clients is measured solely from a commercial or financial standpoint. These are more persistent than any other lawyers in their search for clients. Too frequently their services, if rewarded by

Undoubtedly, a lawyer who offered a plausible reason to decline an appointment was not dragooned into service. Few cases can be found resembling the instant case, in which a

---

> small fees, are half-hearted or openly negligible. This leaves their clients practically or wholly unprotected. They are commonly referred to as "shysters", but also described as "snitch lawyers," "jail lawyers," "vampires," "legal vermin" and "harpies," and by other inelegant but extremely emphatic phraseology. They are grasping and mercenary--without character, ability or conscience. They prey upon the ignorance or fear of the prisoner, or of his relatives or friends, in their effort to extort a fee. If it be not forthcoming (or often when it is) they advise the prisoner to plead guilty, on the pretext that he will get greater leniency from the court than by standing trial. He may at times go through the forms of a trial, but the defense is perfunctory on its face, and the client pays the penalty, perhaps not for the crime charged, but often for his poverty.

lawyer's claim of lack of competence was overruled by a court.

The necessity for appointing courts to defer to the good faith judgments of attorneys who seek to decline appointment has been recognized in the reported decisions of Florida, Ohio and California. In Easley v. State, 334 So. 2d 630 (Fla. Dist. Ct. App. 1976), the Florida District Court of Appeal reversed a judgment of contempt against a lawyer who filed an affidavit of his client concurring in the lawyer's own assessment of incompetence after the trial court had denied a previous motion to withdraw. The trial court interpreted counsel's action as "a scheme to secure release from appellant's obligation as an attorney to assist the court in the representation of indigent criminal defendants." On appeal, the court

concluded that counsel who feels himself incompetent to represent a client, despite a court order to provide such representation, has a duty "to communicate his feelings of lack of competence" to the client:

> There is no finding, nor indeed on the evidence could there be, that appellant did not in good faith feel his inadequacy to handle felonies. Moreover, in accord with the ethical obligations of an attorney, we think it was incumbent upon appellant to communicate his feelings of lack of competence to the defendant Gulvin.

Id. at 632 (footnote omitted). The Florida court recognized that a lawyer's own conclusions about his competency, his conflicting loyalties, his availability and solvency, and his feelings of repugnance are likely to interfere with the lawyer-client relationship, regardless of the fact that an appointing

court may disagree with those conclusions.

> The court's finding of appellant's competence in criminal matters wouldn't make it a fact; and nothing in the evidence impeaches appellant's assertion to the contrary. Furthermore, appellant never actually refused to represent Gulvin in contravention of the court order. He simply informed the defendant, as he should have, that he felt incompetent to represent him and thereafter filed a motion consistent with the desires of his client. He could have done no less and is not guilty of contempt for doing so.

Id. (emphasis in original).

A similar dilemma was presented to the Court of Appeals of Ohio in State v. Gasen, 356 N.E.2d 505 (Ohio Ct. App. 1976). There, the trial court appointed a deputy public defender to represent a criminal defendant over the lawyer's objection that he could not effectively represent the client and that to do so

would violate the Code of Professional Responsibility, since the defendant was already represented by another lawyer who had failed to appear. Id. at 506. Significantly, the court of appeals held that a lawyer's duty to decline to represent a client is no different when the attorney is appointed by the court than it would be if the client walked in off the street:

> Clearly, the ethics of the legal profession demand that any attorney, private or public, decline to represent a party when such attorney is unable, for valid reasons, to fully and adequately prepare such party's case, or when such party is already represented by competent counsel. Failure of an attorney to decline to perform such representation may result in disciplinary measures being taken against him. DR 6-101.

Id. at 507 (emphasis in original). Since the duty to decline employment arises from such a complex matrix of ethical

judgments by the attorney involved, it is difficult to imagine any circumstances where a court would be justified in substituting its judgment for that of the attorney.

In Chaleff v. Superior Court, 69 Cal. App. 3d 721, 138 Cal. Rptr. 735 (1977), a deputy public defender was held in contempt for declining an appointment to serve as "advisory counsel" to a defendant who insisted upon his right of self-representation. Id., 69 Cal. App. 3d at 723-24. Among the reasons cited by the attorney for declining the appointment were conflicts with the client over what defenses or witnesses should be presented, and adverse consequences to the rest of his case load. Id. at 723. The court of appeal vacated the judgment of contempt, concluding that Rule 2-111 of the

California Rules of Professional Responsibility permits a lawyer to withdraw from representation of a client whenever the duty to a client impinges upon the lawyer's ethical responsibility as a member of the bar. Noting that public defenders "are subject to the Rules of Professional conduct governing the action of lawyers no less than other members of the State Bar," the court concluded that Chaleff went as far as he could in disclosing his untenable ethical position without divulging privileged information. Id. at 724.

Reliance upon the appointment system of a century ago also creates a dilemma, if we seek to "apportion the duty" among a large cross-section of the bar and still provide competent representation. A century ago, a large cross-section of the bar could step in and competently

represent a defendant in a civil action for damages. Today, the bar is highly specialized, and the burden of providing competent representation to indigents such as the plaintiffs in this case will necessarily be concentrated on a small proportion of all lawyers. The point was aptly made by Justice Macklin Fleming in Luke v. County of Los Angeles, 269 Cal. App. 2d 495, 74 Cal. Rptr. 771 (1969):

> The complexities of modern society and modern legal practice have increasingly specialized the activities of lawyers and narrowed the area of a particular practitioner's effectiveness. Today law comprehends a myriad of different processes, and lawyers must necessarily specialize in only a few of them in order to achieve and maintain competency in their work. As a consequence their experience at the bar has become fragmented. No longer will it serve for a court to select a lawyer-bystander in the courtroom, since with the best of professional intentions the latter may only be

> qualified to furnish perfunctory and transitory representation, perhaps in a field of law in which he has little personal interest or current familiarity. Effective representation today requires counsel experienced in the particular field of law involved. (Cf. Lucas v. Hamm, 56 Cal. 2d 583 [15 Cal. Rptr. 821, 364 P.2d 685 (1961)]; People v. Ibarra, 60 Cal. 2d 460 [34 Cal. Rptr. 863, 386 P.2d 487 (1963)].) Yet to acquire this experience and maintain an acceptable level of competency in a given field of the law demands continuous study, application, and practice. We think the days are past when a lawyer could be expected to do this solely as a public service. If society is to demand representation by counsel in an expanding variety of proceedings and to insist on a high level of competency in the performance of such representation, then counsel should be paid. Is it reasonable today to attach to a statute which provides for court-appointed counsel in a custodial proceeding an interpretation that appointed counsel will render his services for nothing?

Id., 269 Cal. App. 2d at 499.

Our concept of what competent representation requires has also changed. The suggestion that the representation of indigent clients is "less burdensome" because their cases are "less complex" may actually reflect an unstated double standard of competency. How complex or burdensome a case may be should have little to do with the breadth of the client's wallet. The assignment of appointed clients on the theory that their cases are "less complex" frequently becomes a self-fulfilling prophecy. Their cases never become "complex" because the lawyers are not motivated to probe any possible complexities. The United States Court of Appeals for the District of Columbia recently struggled with this unstated double standard in an appeal from a summary judgment against a group of lawyers who were required to

take parental neglect cases pro bono as a condition to being appointed to compensated cases in the D.C. Family Court. The trial court concluded that this obligation was not a "burdensome" taking, because "neglect cases do not usually require substantial research and investigation efforts." Family Division Trial Lawyers v. Moultrie, 725 F.2d 695, 709 n.19 (1984). In reversing the grant of a summary judgment, the court of appeals suggested that the burden should be measured in terms of the services as they should be performed under adequate professional standards:

> But there is a more fundamental reason why we cannot accept the district court's grant of summary judgment. The stakes in the case are too great not only for the lawyers and court personnel but also for the parents and children involved in neglect cases to let stand a judgment mistakenly entered without any

> judicial inquiry upon "facts"--that representation of parents in neglect cases entails minimum time and effort and need exact no substantial premium in time or talent from legal advocates--which are widely perceived in the local bar and in the community at large, not to be true, and which have been the core of a decade-old controversy. Such a judicial affirmation made without an adequate inquiry into these facts' truth or falsity would, we fear, invite disrespect of the courts and undermine the credibility of their procedures.

Id. at 708-09 (footnote omitted).

A return to the use of mandatory uncompensated appointments as a solution to the problem of providing counsel to indigents creates a substantial risk of institutionalizing a double standard of competency.[3] Taking this step requires

---

[3] For this reason, amici takes a dim view of the appointment of counsel without compensation in criminal cases. This issue is not before the court.

the rejection of the accumulated wisdom of a century's experience, not only in America [see Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice, pp. 34-35 (1963); A.B.A. Standards Relating to Providing Defense Services, Section 2.4 (1967)], but throughout the civilized world [see Lord Parker, The Development of Legal Aid in England since 1949, 48 A.B.A.J. 1029 (1962)].

II. AN APPOINTMENT WHICH MAKES NO PROVISION FOR REIMBURSEMENT OF OUT-OF-POCKET EXPENSES MAY REQUIRE REJECTION BY A LAWYER.

It is essential to carefully separate the issues raised by failure to compensate appointed counsel from the very different issues raised by failure to reimburse counsel for the costs and

expenses of litigation. The appointment as counsel in this case will require litigation of a civil rights suit involving several parties, extensive discovery, numerous witnesses, and complex factual issues requiring consultation with experts. Obviously, the expenses involved in deposition costs and fees for investigators and experts could be substantial. To require appointed counsel to pay these expenses out of his own pocket would create a significant conflict of interest and violate the constitutional guarantee that property will not be taken without due process of law. Even if this Court were to conclude that appointed attorneys are obligated to offer their services without compensation, this obligation cannot be expanded to include liability for the expenses incurred in providing

representation without creating a serious ethical dilemma for appointed counsel.

The distinction between compensation for services and reimbursement for expenses finds deeply rooted support in the ethical canons which have traditionally guided the legal profession. Canon 42 of the Canons of Ethics, adopted by the American Bar Association in 1928, provided:

> A lawyer may not properly agree with a client that the lawyer shall pay or bear the expenses of litigation; he may in good faith advance expenses as a matter of convenience, but subject to reimbursement.

In Opinion 259, this Canon was construed by the A.B.A. Committee on Professional Ethics and Grievances to preclude lawyers doing volunteer legal work for servicemen from directly advancing costs without an agreement for reimbursement:

> We think, however, it would not prohibit the committee [on war work] from advancing costs in indigent cases out of funds provided for that purpose and, of course, a lawyer member of the committee could subscribe to such a fund if he so desired.

The same proscription was carried forward into the Code of Professional Responsibility which the A.B.A. promulgated in 1969. The disciplinary rules codified under Canon 5, which addresses conflicts of interest, included DR 5-103, Avoiding Acquisition of Interest in Litigation:

> (B) While representing a client in connection with contemplated or pending litigation, a lawyer shall not advance or guarantee financial assistance to his client, except that a lawyer may advance or guarantee the expenses of litigation, including court costs, expenses of investigation, expenses of medical examination, and costs of obtaining and presenting evidence, <u>provided the client</u>

remains ultimately liable for such expenses. [Emphasis supplied.]

It is important to recognize that the prohibition of the lawyer's payment of costs and expenses of litigation has always co-existed with rules allowing contingency fee agreements, although both give a lawyer an interest in the litigation. This dichotomy was directly addressed in the Ethical Considerations offered to explicate Canon 5:

> EC 5-7 . . . Although a contingent fee arrangement gives a lawyer a financial interest in the outcome of litigation, a reasonable contingent fee is permissible in civil cases because it may be the only means by which a layman can obtain the services of a lawyer of his choice. But a lawyer, because he is in a better position to evaluate a cause of action, should enter into a contingent fee arrangement only in those instances where the arrangement will be beneficial to the client.

> EC 5-8 A financial interest in the outcome of litigation also results if monetary advances are made by the lawyer to his client. Although this assistance generally is not encouraged, there are instances when it is not improper to make loans to a client. For example, the advancing or guaranteeing of payment of the costs and expenses of litigation by a lawyer may be the only way a client can enforce his cause of action, but the ultimate liability for such costs and expenses must be that of the client.

One can certainly question the significance of this distinction where the lawyer represents a plaintiff in a suit for damages. In that instance, the interests of the lawyer and the client largely coincide: if the case is successful, the lawyer is assured of both his fee and reimbursement of expenses, and if the case is not successful, the lawyer's claim for reimbursement of expenses may not be worth much. There

may be a difference in the appearance of propriety between cash outlays for a client and the devotion of hours without billing. But the real risk of conflict seems academic. A lawyer who willingly invests many hours of time in a case is unlikely to jeopardize his client's interests, and his own, by not undertaking discovery or retaining necessary experts simply to avoid the expense.[4]

---

[4] These considerations led to a revision of the A.B.A. provisions in the Model Rules of Professional Conduct adopted in August 1983. Rule 1.8(e) now provides:

> A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation, except that: (1) a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter; and (2) a lawyer representing an indigent client may pay court costs and

---

> expenses of litigation on behalf of the client.

Subsection (e)(1) simply recognizes that the distinction between a contingent fee for services and contingent reimbursement of expenses is hardly a difference worth preserving. Rule 1.5 requires, however, that contingent fee agreements clearly specify whether litigation expenses are to be deducted "before or after the contingent fee is calculated," and the comment to the rule cautions lawyers that:

> An agreement may not be made whose terms might induce the lawyer improperly to curtail services for the client or perform them in a way inimical to the client's interest. For example, a lawyer should not enter into an agreement whereby services are to be provided only up to a stated amount when it is foreseeable that more extensive services probably will be required, unless the situation is adequately explained to the client. Otherwise the client might have to bargain for further assistance in the midst of a proceeding or transaction.

Subsection (e)(2), of course, goes no further than Opinion 259, supra, in permitting a lawyer to voluntarily

Representation of plaintiffs in a civil rights case, however, raises different considerations. The primary relief sought may be injunctive. A pervasive conflict of interest casts its cloud in making dozens of tactical decisions. Should the deposition of a particular witness be taken? Should an expert be consulted or retained? Each such decision requires the lawyer to reach for his own wallet, and ask himself, "Can I really afford this?"

Quite apart from the ethical dilemma of conflicting self-interest created by appointment of counsel without reimbursement for expenses, is the constitutional problem of taking counsel's property without due process of law. In State ex rel. Wolff v. Ruddy,

---

contribute court costs, in addition to contributing his services.

617 S.W.2d 64 (Mo. 1981), the Missouri Supreme Court, while upholding a plan requiring counsel to provide services to indigents without compensation, held that this plan could not require attorneys to advance personal funds for costs or expenses. Id. at 67. In Williamson v. Vardeman, 674 F.2d 1211 (8th Cir. 1982), a writ of habeas corpus was granted to an attorney who had been held in contempt by a Missouri judge for refusing to accept an appointment as counsel which would require him to advance costs of taking depositions, hiring an investigator, and retaining experts to evaluate laboratory evidence. Id. at 121-13, 1216. The court concluded:

> Requiring lawyers to pay the necessary expenses of criminal defense work without reimbursement is, however, constitutionally distinct from merely compelling lawyers to provide their services.

> Expenses might include investigatory services, deposition costs, witness fees, payment of expert witnesses, and similar outlays. While we understand that in many cases, because of lost opportunities and payment of fixed costs, the burden of providing services without compensation is comparable to that of paying expenses, lawyers have no duty to pay expenses. The class of lawyers has no more obligation to pay such expenses than any other class of citizens. Compelling individual attorneys to bear such costs raises serious due process issues. . . . Counsel's rights were violated when he was asked to pay the expense involved in defending an indigent and held in contempt when he refused to assume the defense under these conditions.
>
> Thus, although we find Missouri has adopted a constitutional procedure, we hold the trial court impermissibly failed to implement that procedure by denying counsel's request for an order requiring the State to pay his expenses or upon the State's failure to so pay, that the court discharge the accused. If this procedure had been followed, counsel would have been relieved of his appointment. This did not happen. Counsel was thus ordered to advance payment of funds necessary

> to the defense of the accused. We find that execution of this order would constitute a "taking" of counsel's property without just compensation in violation of the due process clause of the fourteenth amendment.

Id. at 1215-16 (emphasis supplied).

The Supreme Court of New Hampshire recently agreed with both of these opinions in holding that a denial of full reimbursement of expenses to an attorney appointed to represent an indigent was an unconstitutional taking of property. State v. Robinson, 465 A.2d 1214, 1217 (N.H. 1983). In addition to Missouri and New Hampshire, three other states which have rejected a right of compensation for the services of appointed counsel have carefully distinguished counsel's right to reimbursement for out of pocket expenditures. People v. Kinion, 454 N.E.2d 625, 630-32 (Ill. 1983); State v. Second Judicial District Court, County of

Washoe, 453 P.2d 421, 422-23 (Nev. 1969); State in Interest of Antini, 251 A.2d 219, 294 (N.J. 1969); State v. Rush, 217 A.2d 441, 450 (N.J. 1966); State v. Horton, 170 A.2d 1, 9-10 (N.J. 1961).

The right to competent counsel is a meaningless gesture if counsel for an indigent plaintiff is denied the use of working tools essential to the establishment of a tenable claim. To require appointed counsel to supply these tools out of his pocket, however, would impose an intolerable conflict of interest upon the client, and an unconstitutional deprivation of property upon counsel.

III. THE ETHICAL DUTY TO "NEVER REJECT . . . THE CAUSE OF THE DEFENSELESS OR OPPRESSED" DOES NOT MANDATE THE ACCEPTANCE OF ALL COURT-APPOINTED CLIENTS.

In rejecting the petitioner's motion to dismiss the order of appointment, the district court explicitly relied upon its prior unpublished opinion in Coburn v. Nix, Civ. No. 86-716-B. There, principal reliance for the appointment power was posited on the Oath of Admission to practice in the Southern District of Iowa, whereby a lawyer pledges to "never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." Local Rule 1.5.5, United States District Court for Southern District of Iowa.

It is respectfully suggested that this oath lends no support whatever to

the proposition that lawyers owe an obligation to accept appointments to represent indigent clients. The oath simply recycles an Oath of Admission to the Bar which was first formulated for use in the state of Washington, and was adopted by the American Bar Association in 1908. See 33 Reports of the A.B.A. 584 (1908). Many other states still have a virtually identical statutory provision. See, e.g., Ore. Rev. Stat., Section 9.460.(8). The provision describing the duty not to reject the cause of the defenseless or oppressed was clearly not intended to address the question of representation of indigents, but simply to describe the lawyer's obligation to represent the unpopular client. No better evidence of this can be found than the fact that, among the earliest states to adopt the oath by

statute were three states which have long recognized that attorneys appointed to represent indigents are constitutionally entitled to compensation: Iowa, Indiana and Wisconsin. 33 Reports of the A.B.A. 584 n.1 (1908). In Hall v. Washington Co., 2 Greene 473 (Iowa 1850), the Iowa Supreme Court concluded that court appointment of attorneys without compensation would violate the provision of the fifth amendment of the United States Constitution that private property shall not be taken for public use without just compensation.[5] Four years later, in 1854, the Supreme Court of Indiana held that appointments of lawyers without

---

[5] In Samuels v. County of Dubuque, 13 Iowa 536 (1862), however, the court upheld a statutory limitation of $25 for fees for representing indigent defendants, holding that such representation was a duty of attorneys as "officers of the law."

compensation violated two provisions of its state constitution: a provision that "no man's particular services shall be demanded without just compensation," and "the fundamental law which provides for a uniform and equal rate of assessment and taxation upon all the citizens." Webb v. Baird, 6 Ind. 13 (1854). Likewise, the Supreme Court of Wisconsin relied on the fifth amendment principle of just compensation in holding that the power and duty to compensate appointed counsel arises out of the power to appoint. County of Dane v. Smith, 13 Wis. 654 (1861). Yet none of these three states saw any inconsistency in defining the duties of attorneys in precisely the same language utilized in the A.B.A. oath. Other states which have recently joined this growing minority also recognize the A.B.A. Code of Professional

Responsibility and utilize the A.B.A. Oath of Admission. These include Kentucky, Bradshaw v. Ball, 487 S.W.2d 294, 298 (Ky. Ct. App. 1972), and Nebraska, Kovarik v. County of Banner, 224 N.W.2d 761, 764-65 (Neb. 1975). Even the state of Washington, where the oath originated a century ago, and is still required by both statute (Wash.Rev. Code Section 2.48.210 (1961)) and rule (Wash. Rules for Admission to Practice, Rule 5(G) (1965)), has joined the ranks of those states which no longer countenance the appointment of counsel to serve without compensation. Honore v. Washington State Board of Prison Terms & Paroles, 466 P.2d 485, 496 (Wash. 1970).

The true meaning of duty to never reject "the cause of the defenseless or oppressed" was explored by former Yale Law School Dean Eugene V. Rostow in the

Morrison Lecture presented to the State Bar of California in 1961. Describing the tradition of British barristers, who are obligated to take every case that walks in the door, he compared their role to that of a cab driver--"bound to answer at the first hale." Accompanying this tradition, however, is a governmental commitment to provide adequate compensation to the barristers who take on representation of the indigent. See Report of the Attorney General's Committee on Poverty and the Administration of Federal Criminal Justice, p. 37 (1963). Dean Rostow then compared the very different tradition of American lawyers:

> The code of ethics of the American Bar has never accepted the British rule in its full majesty, even in criminal cases. Canon 31 of the Canons of Professional Ethics adopted by the American Bar Association

> declares that "no lawyer is obliged to act either as adviser or advocate for every person who may wish to become his client. He has the right to decline employment." The Canon stresses the lawyer's individual responsibility for accepting or declining requests for professional services. And it makes no reference, directly or indirectly, to the principle of the English rule as a factor the lawyer is to take into account in exercising his responsibility. It should be added, however, that the lawyer's oath, recommended by the American Bar Association, and widely used, contains these words: "I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed." At least one authority has said that "where the English rule is obligation to accept except under special circumstances, the American rule is obligation not to refuse where special circumstances exist."

Rostow, The Lawyer and His Client, 48 A.B.A.J. 25, 29-30 (1962). Dean Rostow concluded that the oath simply describes the aspiration of American lawyers to

strive for the ideal personified by John Adams representing the British soldiers accused of the "Boston Massacre." (Adams, incidentally, was retained in that case for a one-guinea fee. Page Smith, A New Age Now Begins, vol. I, p. 346 (1976)).

IV. IMPOSITION OF A MANDATORY DUTY TO ACCEPT COURT-APPOINTED CLIENTS WOULD REQUIRE RECONSIDERATION OF THE DENIAL OF IMMUNITY FROM MALPRACTICE CLAIMS IN FERRI V. ACKERMAN.

The risks which a court imposes upon an unwilling

attorney with a mandatory appointment go far beyond the disruption of the normal lawyer-client relationship. The risks may extend to the harassment of subsequent malpractice suits. In Ferri v. Ackerman (1979) 444 U.S. 193, this

Court held that attorneys appointed to represent indigent clients in federal criminal proceedings are not entitled to the absolute immunity conferred upon judges and prosecutors. In doing so, however, the Court noted that the increased risk of malpractice liability for such lawyers was "not implausible":

> Respondent argues that there are valid policy reasons that justify an immunity for appointed counsel not accorded privately retained counsel. The claim is that a defendant's relationship with appointed counsel is substantially different than it would be with retained counsel because of the inability to choose and freely to discharge counsel. See, e.g., Criminal Justice Act Plan for the Western District of Pennsylvania Section IV A(3). The defendant would therefore tend to perceive appointed counsel as a representative of the government and to view him with suspicion. After conviction, a defendant's inevitable bitterness would lead to a high risk of retaliatory law suits, the same fear that underlies immunity

for judges and prosecutors. Butz v. Economou, 438 U.S. 478, 510, 57 L.Ed.2d 895, 98 S.Ct. 2894. Further, because of the increased risk of malpractice actions, appointed counsel would be more susceptible to pressure from clients to call additional witnesses or to make additional arguments that would in fact prejudice the defendant's own case. But respondent has not directed our attention to any empirical data--in judicial decisions, legislative hearings, or scholarly studies--to support his conclusions that the risk of malpractice litigation deters members of the private bar from accepting the representation of indigent defendants or adversely affects the quality of representation. Given the speculative, though not implausible, nature of respondent's arguments, we are unwilling to ascribe to Congress an intent to accord an immunity to appointed counsel not given retained counsel in the face of the silent legislative history on this point.

Id. at 200-01 n.17; cf. Tower v. Glover, 467 U.S. 914 (1984). Significantly, this Court avoided the problem in Ferri v.

Ackerman by assuming that lawyers were free to decline such appointments. Noting that the risk of malpractice liability must be offset by the level of compensation offered to ensure a supply of lawyers willing to accept appointments, the Court left that equation for Congress to resolve:

> Perhaps the most persuasive reason for creating such an immunity would be to make sure that competent counsel remain willing to accept the work of representing indigent defendants. If their monetary compensation is significantly less than that of retained counsel, and if the burden of defending groundless malpractice claims and charges of unprofessional conduct is disproportionately significant, it is conceivable that an immunity would be justified by the need to preserve the supply of lawyers available for this important work. Whether a sufficient need can be demonstrated that would justify such a rule, or whether such a problem might be better remedied by adjusting the level of compensation, are

> questions that can most appropriately be answered by a legislative body acting on the basis of empirical data.

Id. at 204-05. In the absence of such a legislative judgment, it would be incongruous to interpret Section 1915(d) to permit mandatory appointment of counsel. If no immunity is afforded, then every lawyer subjected to such an appointment is saddled with the additional burden of insuring himself against the increased risk to which he is exposed. If immunity is afforded, the indigent client is given less protection against incompetence than the non-indigent. The dilemma can only be avoided by making the same assumption which the Court made in Ferri v. Ackerman: the acceptance of a court appointed client is a voluntary act by the attorney, who willingly assumes all

the risks and the rewards that the ensuing lawyer-client relationship might bring.

CONCLUSION

Even if 28 U.S.C. Section 1915(d) is construed to permit "appointment" of lawyers to represent indigent plaintiffs, lawyers must remain free to decline such appointments. The nature of the attorney-client relationship and the ethical responsibilities of a lawyer may compel such action. The duty to represent the "defenseless and oppressed" certainly imposes no ethical obligation to accept appointments deemed unacceptable by the lawyer, and the denial of immunity from malpractice claims in Ferri v. Ackerman assumes that lawyers remain free to reject even appointments that are compensated.

From the standpoint of public policy, the assertion of judicial authority to mandate acceptance of court appointed clients may have disastrous consequences. Rather than meeting the need to supply indigents with lawyers, the assertion of this authority may seriously undermine the voluntary programs already in place to meet that need. These programs rely on the willingness of thousands of lawyers to make their services available at little or no charge. These lawyers, in turn, rely on the control they have over their own pro bono spigot. As long as they are free to reject a case that may be too burdensome or costly or that demand competence in unfamiliar terrain, they remain willing to accept their fair share of the work to be done. Once the courts establish a policy of mandatory pro bono,

and assert ultimate control over every lawyer's spigot, it can reasonably be anticipated that volunteer pro bono activity will decline dramatically. If every lawyer must be available to respond to the call of a court, then few lawyers will risk loading their calendars with cases which do not meet that mandatory obligation. A process of displacement could occur, by which the needs of those indigents--whose new "right to counsel" in civil cases would have been selectively recognized--will be met, while those not favored with such status are left unrepresented, even though they are no less, and frequently more, deserving. An affirmative ruling by this Court may very well cause the current level of public support for providing legal services to indigents to decline. There would be little incentive to spend

tax dollars to support legal aid programs if the courts had the power to supply lawyers by mandatory appointment. If our goal is to maximize the delivery of legal services to the indigent, a policy of mandatory court appointment may be the most costly, disruptive and inefficient alternative available.

Unless this Court provides for the appointment of counsel to <u>all</u> indigent civil litigants, individual courts will have to exercise discretion in determining which indigents will be able to obtain counsel. If the appointment of counsel were left to the discretion of the courts, as the request for counsel is now, the lack of definitive standards for the selection of counsel would result in arbitrary discrimination between litigants who a particular court decides are worthy of counsel and litigants who

are denied counsel. Allowing the courts wide discretion to appoint counsel in civil cases, without articulated, uniform standards to establish which indigents should have assistance of counsel in which cases, would have a negative impact on the fairness of the system. Congress, which is in the best position of balancing the issues involved, should be the body that promulgates such standards. Amici favor the establishment of uniform

standards for the appointment of compensated counsel in civil cases.

Respectfully submitted,

GERALD F. UELMEN
Counsel of Record
Santa Clara University School of Law
Santa Clara, CA 95053
Telephone (408) 554-4361
Counsel for Amicus Curiae
California Attorneys for Criminal Justice

EPHRAIM MARGOLIN
240 Stockton Street, Third Floor
San Francisco, CA 94108
Telephone (415) 421-4347
Counsel for Amicus Curiae
National Association of Criminal Defense Lawyers, Inc.